



ADMINISTRATIVE REVIEW COUNCIL

**FEDERAL JUDICIAL REVIEW  
IN AUSTRALIA**

September 2012

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## ADMINISTRATIVE REVIEW COUNCIL

The Hon Nicola Roxon MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General

It is with pleasure that I submit to you the Administrative Review Council's report *Federal Judicial Review in Australia*.

Judicial review provides an important avenue of appeal for those affected by government decision making. It is a central feature of the administrative law system as a means of ensuring the accountability of officials for the legality of their actions.

The Council considers the judicial review system in light of recent jurisprudence interpreting the *Administrative Decisions (Judicial Review) Act 1977*, as well as the *Australian Constitution* and the *Judiciary Act 1903*. The Council revisits—and in some cases, revises—many of its previous recommendations in relation to judicial review. Recent developments, in the migration jurisdiction in particular, have significantly shaped the judicial review landscape in Australia.

We look forward to your consideration of this body of work.

Yours sincerely

A handwritten signature in black ink that reads 'Colin Neave'.

Colin Neave AM  
President

# THE ADMINISTRATIVE REVIEW COUNCIL

The following people were members of the Administrative Review Council at the time of publication:

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Mr Colin Neave AM

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The Hon Justice Duncan Kerr Chev LH  
President, Administrative Appeals Tribunal (appointed 16 May 2012)

Prof Rosalind Croucher  
President, Australian Law Reform Commission

Prof John McMillan AO  
Australian Information Commissioner

Ms Alison Larkins  
Acting Commonwealth Ombudsman (from 31 October 2011)

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The Council thanks the Secretariat for its work coordinating this report, and in particular acknowledges the contribution of Miranda Lello and Margaret Meibusch.

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# LIST OF ABBREVIATIONS

AAT	Administrative Appeals Tribunal
<i>AAT Act</i>	<i>Administrative Appeals Tribunal Act 1975</i>
ABCC	Australian Building and Construction Commissioner
ACBPS	Australian Customs and Border Protection Service
ACC	Australian Crime Commission
ACLEI	Australian Commission for Law Enforcement Integrity
<i>ADJR Regulations</i>	<i>Administrative Decisions (Judicial Review) Regulations 1985</i>
<i>ADJR Act</i>	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AEC	Australian Electoral Commission
AFP	Australian Federal Police
AGD	Attorney-General's Department
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
ANEDO	Australian Network of Environmental Defenders Offices
APRA	Australian Prudential Regulation Authority
APS	Australian Public Service
APSC	Australian Public Service Commission
ASIC	Australian Securities and Investments Commission
ASIO	Australian Security and Intelligence Organisation
<i>ASIO Act</i>	<i>Australian Security Intelligence Organisation Act 1979 (Cth)</i>
ATO	Australian Taxation Office
CASA	Civil Aviation Safety Authority
CDDA	Compensation for Detriment caused by Defective Administration
CDDP	Commonwealth Director of Public Prosecutions
DAFF	Department of Agriculture, Fisheries and Forestry

DBCDE	Department of Broadband, Communications and the Digital Economy
DEEWR	Department of Education, Employment and Workplace Relations
DFAT	Department of Foreign Affairs and Trade
DIAC	Department of Immigration and Citizenship
EFIC	Export Finance and Insurance Corporation
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth)
FMA Act	<i>Financial Management and Accountability Act 1997</i> (Cth)
FOI Act	<i>Freedom of Information Act 1982</i>
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
IGIS	Inspector General of Intelligence Security
LEIC Act	<i>Law Enforcement Integrity Commissioner Act 2006</i> (Cth)
MRT-RRT	Migration Review Tribunal–Refugee Review Tribunal
NGF	National Guarantee Fund
NSLPD	National Security Law and Policy Division of the Attorney-General’s Department
NWPP	National Witness Protection Program
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Cooperation and Development
PCJIS	Parliamentary Joint Committee on Intelligence and Security
PIAC	Public Interest Advocacy Centre
RBA	Reserve Bank of Australia
SEGC	Security Exchanges Guarantee Corporation
SSAT	Social Security Appeals Tribunal



# EXECUTIVE SUMMARY

## INTRODUCTION

The Administrative Review Council has examined in detail the various aspects of the federal judicial review system in Australia. The current system is a product of its constitutional context and the history of reforms in this area. There are several different mechanisms for seeking judicial review of Australian Government decisions and actions, and the Council makes recommendations for better integration of the review mechanisms and access to judicial review in federal courts.

The Council's recommendations build from the constitutional basis of judicial review, recognising that, while section 75(v) of the *Australian Constitution* provides an important minimum standard of review, it may not provide the most effective model for review. Ultimately the Council considers that a judicial review statute such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) allows the legislature to: affirm the importance of the legal accountability of administrative decision makers, identify potential grounds upon which their decisions can be challenged; provide for the right to request reasons; and offer clear guidance on standing and remedies. The Council's recommendations therefore focus on restoring the *ADJR Act* to a central place in the federal judicial review system.

## CONTEXT—A FRAGMENTED SYSTEM

In the Australian federal system, the starting point for any discussion of judicial review is s 75(v) of the *Constitution*. Section 75(v) confers original jurisdiction on the High Court of Australia 'in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'.

Before 1980, s 75(v) was the primary means of seeking judicial review of Commonwealth Government decisions and actions, as federal judicial review jurisdiction was not fully conferred on State Supreme Courts. Due to the operation of the *Judiciary Act 1903* (Cth) (*Judiciary Act*), the High Court had exclusive jurisdiction to grant mandamus and prohibition. This meant that an individual needed to seek judicial review from the High Court, by way of a prerogative writ, and without the benefit of identified grounds for seeking review. The Council considers that this is neither an easily accessible way for an individual to seek review of the actions of government officials, nor a good use of the resources of the High Court.

In contrast, State Supreme Courts have inherent power to conduct judicial review as a matter of common law. While the High Court's decision in *Kirk v Industrial Court (NSW)*<sup>1</sup> has given the inherent judicial review powers of State Supreme Courts a basis in the *Constitution*, there are important differences between judicial review in the States and Territories and at the federal level. State Supreme Courts have a general review power, and assess the availability of remedies in particular cases. In the case of federal courts, the jurisdiction to conduct review is granted by

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<sup>1</sup> (2010) 239 CLR 531.

## *Federal Judicial Review in Australia*

the *Constitution* or by specific legislation, and is subject to jurisdictional limits on the grant of power in those instruments.

In 1971, the Commonwealth Administrative Review Committee chaired by Sir John Kerr (Kerr Committee) recommended significant changes to the federal system for review of government decisions. The Kerr Committee's recommendations included codifying the grounds of judicial review and simplifying procedures for review applications, as well as establishing a superior federal court with jurisdiction to hear judicial review applications. Following these recommendations, the Committee of Review of Prerogative Writ Procedures, chaired by RJ Ellicott QC (Ellicott Committee) examined the Kerr Committee's proposals for a reformed system of judicial review. In 1973, the Ellicott Committee endorsed the view that the state of the law relating to judicial review of administrative action was technical and complex and in need of reform, simplification and legislative statement.

The *ADJR Act* passed through Parliament in 1977 and came into force in 1980, introducing a simplified procedure for applying for review, a list of grounds and flexible remedies expressed in plain language. Establishing the Federal Court of Australia also meant that the High Court was no longer the primary forum for judicial review.

The aim of the *ADJR Act* was to codify the common law of judicial review and to be the primary means of seeking review of government decisions. The *ADJR Act* was not, however, intended to cover all administrative decisions. For example, it cannot be relied upon for seeking review of non-statutory administrative decisions. In addition, Australian Government policy has determined that a number of areas of statutory decision making should be excluded from the *ADJR Act*. While some exclusions were included in the *ADJR Act* from its inception, others were carved out of the ambit of the Act at a later stage—most notably migration decisions.

The restrictions on the jurisdiction of the Federal Court to conduct review under the *ADJR Act* resulted in a number of applications being made to the High Court under s 75(v) of the *Constitution*. Although the High Court had the power to remit matters back to the Federal Court under s 44 of the *Judiciary Act*, this placed an administrative burden on the High Court. To address this issue, s 39B(1) was inserted into the *Judiciary Act*, granting the Federal Court the same jurisdiction as the High Court under s 75(v).

Further developments in the judicial review landscape included the establishment of the Federal Magistrates Court, which also assumed equivalent jurisdiction to the High Court under s 75(v) to review decisions made under the *Migration Act 1958* (Cth) (*Migration Act*).

Since the enactment of the *ADJR Act*, jurisprudence on s 75(v) has developed significantly. Because the High Court's jurisdiction under s 75(v) is defined by the constitutional writs of mandamus and prohibition, 'jurisdictional error' has become the unifying principle for review under s 75(v). The constitutional separation of powers has played an important role in the development of constitutional judicial review. The High Court has held that review for jurisdictional error cannot be excluded or reduced by legislation in the form of privative clauses (clauses which purport to exclude judicial review of particular decisions). However, because it is

## Executive Summary

in the authority of Parliament to define the jurisdiction of decision makers, Parliament can affect the question of what will amount to a jurisdictional error.

In addition to the ‘constitutional review’ mechanisms in s 75(v) of the *Constitution*, s 39B of the *Judiciary Act* and in the *Migration Act*, an increasing number of legislative schemes have set up alternative statutory appeals mechanisms, most notably the statutory appeals mechanisms in the *Taxation Administration Act 1953* (Cth) and in the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*).

## THE INQUIRY

It is the fragmentation of the federal judicial review landscape that prompted the Council to conduct an assessment of the current system, and to consider whether the Council could recommend changes to improve the accessibility and efficiency of federal judicial review. The Council had as its starting point the entrenched provision for judicial review in s 75(v) of the *Constitution*, and its recommendations flow from the fact that review in the High Court for jurisdictional error cannot be excluded by legislation.

The Council consulted widely with the federal courts, tribunals, government agencies, the legal profession and academics. The Council received 24 submissions, including from government agencies who address particular issues relating to Schedule 1 and 2 exemptions (discussed in Chapter 5 and 9 and Appendices B and C). Submissions are listed in **Appendix E** and are available at [www.ag.gov.au/arc](http://www.ag.gov.au/arc).

## KEY CONCLUSIONS

The Council has two important conclusions about the current state of federal judicial review in Australia:

- It is undesirable that there is a different ambit for ‘constitutional review’ under the *Constitution* and the *Judiciary Act* and ‘statutory judicial review’ under the *ADJR Act*.
- The *ADJR Act* continues to play an important role by improving the accessibility of judicial review, as a clear statement of the Parliament’s commitment to be legally accountable for its decisions and by guiding administrative decision makers.

Submissions to the Council strongly support the continuing utility of the *ADJR Act*. Acknowledging dissenting views on this subject, the Council agrees that the *ADJR Act* has benefits that flow from:

- a list of grounds;
- flexible remedies, all of which are available where a ground of review is established;
- the right to request a written statement of reasons; and

- clear standing rules to initiate judicial review proceedings.

The Council's view is that the advantages of the remedial and standing provisions of the *ADJR Act* should, in most cases, also be available in relation to decisions currently only reviewable in the Federal Court under s 39B of the *Judiciary Act*. The federal judicial review system would be more accessible to individuals, and the legal requirements for decision makers clearer, if constitutional review and statutory review were more closely aligned. If the current system of judicial review continues without modification, the *ADJR Act* may become further marginalised and judicial review less accessible.

## RECOMMENDED MODEL FOR FEDERAL JUDICIAL REVIEW

The Council considers that the scope of the *ADJR Act* should be expanded to encompass the jurisdiction of the High Court under s 75(v) of the *Constitution*. The Council recommends a new section be added to the *ADJR Act* to allow an application to be made under the *ADJR Act* where a person would otherwise be able to initiate proceedings in the High Court under s 75(v) of the *Constitution* (**Recommendation 1**). This amendment should allow applicants who would otherwise have had standing under the *ADJR Act* to make a judicial review application under that Act without needing to make an application in the alternative under s 39B of the *Judiciary Act*. Applicants who would otherwise only have been able to make an application under s 39B would be able instead to apply for an order of review under the *ADJR Act*.

The Council also recommends other amendments to the ambit of the *ADJR Act*. Currently, a report or recommendation that is made in the exercise of a power conferred by an enactment, prior to the making of a decision under that enactment, is included in the definition of a decision to which the Act applies in s 3. The Council recommends that there should be another schedule added to the Act, which can be amended by regulation, which should list other reports and recommendations that are decisions to which the Act applies (**Recommendation 2**). While many of these decisions may be reviewable in any case (where a person would otherwise have standing to make an application under s 75(v) of the *Constitution* or an amended *ADJR Act*), this recommendation would ensure that the judicial review jurisdiction of the courts under the *ADJR Act* is clearly stated in relation to particular reports and recommendations. The recommendation would also extend to reports and recommendations by non-Commonwealth officers which could be subject to review where appropriate. The Council would produce guidelines to enable the Council, agencies and parliamentary committees to decide, on a case by case basis, whether specific reports and recommendations should be included in the schedule, and to provide for clear review rights.

The Council also recommends some amendments to the current exemptions from the *ADJR Act*. Decisions to commence civil penalty proceedings should be exempt from the *ADJR Act* on the basis that judicial review could fragment legal proceedings (**Recommendation 3**). The general exemption from the *ADJR Act* of decisions of the Governor-General should be removed and replaced with particular exemptions of certain statutory decisions relating to defence (**Recommendation 4**). The Council has also made particular recommendations with regard to the existing exemptions in Schedule 1, summarised

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and discussed at **Appendix B**, on the basis of principles outlined in Chapter 5 that may justify the restriction of judicial review to its constitutional minimum.

Some decisions for which constitutional judicial review is currently available should also be excluded from an amended *ADJR Act*. For example, the Council considers that decisions made under the Scheme for Compensation for Detriment caused by Defective Administration and certain vice-regal decisions relating to defence could be excluded from the ambit of a revised Act.

The Council does not recommend expanding judicial review beyond the current ambits of the *ADJR Act* and constitutional review. The Council considers a model of review based on a ‘public power’ or ‘public function’ test to be indeterminate and likely to create uncertainty about the coverage of judicial review standards (Chapter 4).

The Council does not recommend the piecemeal expansion of the jurisdiction of the *ADJR Act* to particular areas of non-statutory government decision making. This is a change from previous recommendations of the Council, in particular, in its 1989 Report No 32, *Review of the Administrative Decisions (Judicial Review) Act: The ambit of the Act*. The Council prefers to extend the ambit of the Act to align more closely with constitutional judicial review, while maintaining specific exemptions.

The Council’s preferred model incorporates the ‘officer of the Commonwealth’ test of constitutional judicial review and the current *ADJR Act* test of ‘a decision of an administrative character made ... under an enactment’. By providing for the court to have jurisdiction to make an order of review under the *ADJR Act* in relation to both of these jurisdiction tests, the following decisions remain subject to judicial review:

- decisions of officers of the Commonwealth, regardless of the source of power being exercised or the nature of the action performed;
- decisions made ‘under an enactment’, whether or not a jurisdictional error has occurred; and
- decisions by persons other than officers of the Commonwealth, if made ‘under an enactment’.

## **SEPARATE STATUTORY REVIEW SCHEMES**

Where a well-established mechanism provides for review of administrative decisions and is as accessible and efficient as under the *ADJR Act*, the Council considers that these separate statutory review mechanisms should remain. The Council’s view is that changing the system of judicial review in these cases would inhibit rather than increase access to review. Accordingly, the Council recommends that the separate statutory review scheme for taxation under Part IVC of the *Taxation Administration Act 1953* and the mechanism for statutory appeals to the Federal Court on questions of law from decisions of the Administrative Appeals Tribunal be maintained (**Recommendations 5 and 6**).

## *Federal Judicial Review in Australia*

Ultimately, the Council would prefer migration decisions to be reviewed under the general statutory scheme, if the Council's recommendation is accepted to extend the ambit of the *ADJR Act* to embrace constitutional judicial review. However, acknowledging that return to this structure would have resourcing implications for the courts and the Government, because of the likelihood that any change in the law in this area would lead to a temporary increase in litigation, the Council has not made a specific recommendation with regard to judicial review of migration decisions.

A new avenue for judicial review that operates alongside or in place of the *ADJR Act* should not be established unless there are compelling reasons, and only after consultation with the Attorney-General and the Council (**Recommendation 7**).

### **GROUND OF REVIEW**

The Council has recommended that the current list of grounds in ss 5 and 6 of the *ADJR Act* be retained (**Recommendation 8**). The Council recommends one amendment to the current grounds of review—an amendment to the 'no evidence' ground. Currently ss 5(3) and 6(3) set out the requirements which must be met to make out the 'no evidence' ground in ss 5(1)(h) and 6(1)(h) respectively. The Council recommends that ss 5(3) and 6(3) be amended to clarify these requirements (**Recommendation 8**).

The Council has also considered the usefulness of statutory codes of procedure to accompany the *ADJR Act* grounds of review. The Council considers that procedural guidance in legislation may be useful, but that codes of procedure risk becoming overly prescriptive. The Council will develop clear guidance for policy makers on when statutory codes of procedure or procedural steps in legislation are appropriate, and what form they should take (**Recommendation 9**).

### **STANDING**

The Council considers that minor changes to the standing rules in the *ADJR Act* could improve access to judicial review. The Council considers that the standing of representative organisations is unclear, and that this may prevent organisations from challenging government decisions in which they have an interest. The Council recommends the addition of a provision in the *ADJR Act*—modelled on s 27(2) of the *AAT Act*—to allow applications for review 'if the decision relates to a matter included in the objects or purposes of the organisation or association' (**Recommendation 10**).

### **REASONS**

The Council affirms the importance of the right to reasons in the *ADJR Act*. The Council recognises that, subject to limited exceptions, individuals should generally be able to request reasons for a decision for which judicial review is available. Reasons are valuable because they assist a person to understand why a decision was made, which may prevent further disputes or review applications. Good communication with people affected by decisions can therefore improve trust in government decision making and prevent disputes arising. Having reasons also



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assists courts conducting judicial review to assess whether a decision was made according to law. The Council proposes to update its guidelines on reasons to provide clearer guidance on issues such as the kind of advice that should be sought from legal practitioners regarding reasons and to deal with situations where decision makers may not be able to prepare a statement of reasons (**Recommendation 12**).

Currently, reasons provided under s 13 of the *ADJR Act* do not need to be drafted at the time the decision to which they relate is made. However, contemporaneous recording of reasons for decisions improves the quality of decision making, ensures that the reasons recorded are the actual reasons for the decision and prevents information being lost with staff changeovers. The Council recommends that all agencies endeavour to implement the recording of reasons when making decisions where this is not currently the practice (**Recommendation 11**). The Council recognises that in some cases this may be impracticable, but considers that in the majority of cases contemporaneous recording of reasons—to assist the later provision of reasons to affected parties—should be possible.

The Council recognises that, in some cases, the failure of an agency to fulfil its duty to provide reasons under the *ADJR Act* may result in a situation where proceedings under the *ADJR Act* could have been averted or conducted more simply had an adequate statement of reasons been prepared by the decision maker. The Council recommends that the failure of an agency to provide a statement of reasons that complies with the requirements of s 13 of the *ADJR Act* should be a factor that is taken into account by a court in making a costs order at the conclusion of proceedings under the Act (**Recommendation 13**).

The Council notes that ss 13A and 14 of the *ADJR Act* were enacted prior to the *Freedom of Information Act 1982* (Cth) (*FOI Act*), and are not aligned with the exemptions from the requirements to provide information under that Act. The Council recommends that ss 13A and 14 of the *ADJR Act* be amended to provide that a statement of reasons does not have to disclose:

- any matter that is of such a nature that its inclusion in a document would cause that document to be an exempt document under the *FOI Act*; or
- the notice or statement of reasons for a decision that is required by an enactment to be laid before either House of the Parliament, prior to the date on which that notice or statement of reasons is laid before a House of the Parliament (**Recommendation 14**).

This will reduce the need for Schedule 2 exemptions, some of which are justified on the basis of protecting certain types of information, and will align the *ADJR Act* and the *FOI Act*.

## **COURT PROCEDURES**

The Council considers that the federal courts' current powers are sufficiently flexible to allow for efficient and effective hearing of judicial review cases, and has not recommended any changes to court procedures. The recommended changes to standing should improve access for

representative organisations. In relation to costs, the Council has recommended that, unless the court orders otherwise, parties to a proceeding under the *ADJR Act* should bear their own costs (**Recommendation 15**). The Council proposes to provide educative materials on its website about judicial review, which may assist applications navigating the various forums for review.

## **THE FUTURE WORK OF THE COUNCIL**

The Council proposes to provide new policy guidance and educative materials on a number of aspects of the judicial review system, building on the current Council materials available to government and the public.

The Council also supports the development of a Charter of Good Administration for the Australian Government, and considers this should be developed through cooperation between a range of policy and decision making agencies.

## **SUMMARY**

The Council recommends altering the scope of the *ADJR Act*, without, however, altering the current ambit of judicial review. The Council would more closely align the two current generalist judicial review jurisdictions, encouraging consistency between constitutional and statutory judicial review. The Council considers that the two review mechanisms should be equally accessible. The Council recommends legislative changes to improve accessibility and encourage best practice in government decision making, including to the standing rules in the *ADJR Act* and procedural aspects of the right to request reasons. The Council also acknowledges the effectiveness of guidance material for policy and decision makers, and proposes to update and add to its existing guidelines.

The Council's Report provides a snapshot of federal judicial review in Australia in 2012. The Council aims to provide a vision of federal judicial review into the future.



# 1. OVERVIEW OF THE INQUIRY

## INTRODUCTION

1.1 The Council considers it timely to conduct a comprehensive review of the judicial review landscape in Australia. Since the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) commenced in 1980, many aspects of the federal judicial review system have changed, as have the nature and functions of government. The Council considers this issue on its own motion under s 51 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*).

1.2 Monitoring the effectiveness of the judicial review system is one of the Council's key functions. In producing this Report, the Council considers the system in light of the development through case law of the judicial review principles under the *Australian Constitution* and the *ADJR Act*. The 1971 Report of the Commonwealth Administrative Review Committee on the federal administrative law system, chaired by Sir John Kerr (the Kerr Committee), described the existing legal grounds for judicial review as 'limited' and the remedies 'complicated'.<sup>2</sup> Since that time, despite the availability of new statutory review grounds, the writs in s 75(v) of the *Australian Constitution* have come to represent a guarantee of legal oversight of exercises of executive power. The concept of jurisdictional error has assumed central importance. In addition, significant areas of government decision making are now subject to separate judicial review systems, outside of the ambit of the *ADJR Act*.

## BACKGROUND

### Previous reports by the Council

1.3 The Council has produced a number of reports relating to judicial review of administrative action. In this Report, the Council revisits—and in some cases, revises—many of its previous recommendations in light of subsequent developments in Australian administrative law.

1.4 In its first report in 1978 (Report No 1),<sup>3</sup> the Council identified classes of decisions for exclusion from the *ADJR Act*. Given the broad operation of the *ADJR Act*, the Council considered that 'cogent reasons are required to justify excluding a class of decisions from the beneficial operation of the Act'.<sup>4</sup>

1.5 Many of the Council's recommendations from Report No 1 were incorporated into the Administrative Decisions (Judicial Review) Amendment Bill 1980. After accepting an invitation from the Attorney-General to comment on the Bill, in Report No 9 the Council noted that some exclusions were inconsistent with the Council's previous recommendations

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<sup>2</sup> Commonwealth Administrative Review Council, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) 9.

<sup>3</sup> Administrative Review Council, *Administrative Decisions (Judicial Review) Act 1977—Exclusions under Section 19*, Report No 1 (1978).

<sup>4</sup> Ibid 19.

## *Federal Judicial Review in Australia*

in Report No 1.<sup>5</sup> The Council made a number of recommendations in that Report concerning regulations to delete classes of decisions from the schedules to the *ADJR Act* and about information that should not be included in a statement of reasons, which were not taken up in the Bill.

1.6 The Council's response to the Act was presented in three Reports—in 1986 (Report No 26); 1989 (Report No 32) and 1991 (Report No 33). In Report No 26 the Council considered whether the *ADJR Act* had left public authorities open to unwarranted litigation. The Council found little evidence of the *ADJR Act* being used to delay or frustrate Commonwealth administration merely to gain a tactical advantage, rather than to establish a genuine legal right or interest. The Council did not consider an increase in the number of judicial review cases, or the mere fact of applications for an order of review being refused, as evidence of such abuse. The Council recommended amendments to the *ADJR Act* to extend the Federal Court's powers and to enable that Court to stay or to refuse to grant applications for review in appropriate cases.

1.7 In Report No 32 the Council recommended widening the scope of judicial review under the *ADJR Act* to equate it with review available under s 75(v) of the *Constitution* under the writs of mandamus, prohibition or injunction. The Council reiterated that the Federal Court's discretion to refuse relief or grant an application under the *ADJR Act* should be strengthened. The Council recommended that review under the *ADJR Act* should extend to include a decision of an administrative character made, or proposed to be made, by an officer under a non-statutory scheme or program, the funds for which are authorised by an appropriation made by the Parliament. The Council considers recommendations from Reports 26 and 32 in more detail in Chapter 5 of this Report.

1.8 In Report No 33 the Council recommended the repeal of Schedule 2 of the *ADJR Act*, which exempts specified classes of decisions from the requirement to give reasons. The Council made recommendations to strengthen the provisions of s 13A of the Act, acknowledging the need to prevent the disclosure of information in statements of reasons for decisions that should not, in the public interest, be disclosed. These recommendations are considered in Chapter 9 of this Report.

1.9 In 1995, Report No 38 considered government business enterprises and administrative law.<sup>6</sup> In 1998, Report No 42 considered the contracting out of government services.<sup>7</sup> In both of these Reports, the Council again recommended that *ADJR Act* review extend to a decision of an administrative character made by an officer under a non-statutory scheme or program, the funds for which are authorised by an appropriation made by the Parliament.<sup>8</sup>

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<sup>5</sup> Administrative Review Council, *Administrative Decisions (Judicial Review) Amendment Bill 1980*, Report No 9 (1980). This report followed an invitation from the Attorney-General to comment on the Bill.

<sup>6</sup> Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995) 48.

<sup>7</sup> Administrative Review Council, *The Contracting out of Government Services*, Report No 42 (1998).

<sup>8</sup> Ibid (Recommendation 22); Administrative Review Council, *Government Business Enterprises and Commonwealth Administrative Law*, Report No 38 (1995) 48.

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1.10 In 1999, Report No 41 recommended that the scope of review by the Federal Court should remain unchanged, after considering the need for a specific statutory right of appeal from decisions of the Administrative Appeals Tribunal (AAT).<sup>9</sup> However, the Council also recommended that the Federal Court's powers be expanded to give it discretion to receive evidence and to make findings of fact where there has been an error of law, provided the Court's findings are not inconsistent with those of the AAT.

1.11 The Council has also addressed constitutional and policy considerations relevant to the scope of judicial review. In 2003, Report No 47 provided guidance in the form of indicative principles to assist in determining when limitations to judicial review are acceptable in the context of particular policy and legislative proposals.<sup>10</sup>

### SCOPE OF THE INQUIRY

1.12 In this Report, the Council considers the federal system of judicial review. The functions and powers of the Council relevant to this Report are:

- keeping the Commonwealth administrative law system under review, monitoring developments in administrative law and recommending to the Minister improvements that might be made to the system;<sup>11</sup>
- keeping under review the classes of administrative decisions that are not the subject of review by a court, tribunal or other body and to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, the appropriate body to make that review;<sup>12</sup> and
- inquiring into the adequacy of the law and practice relative to the review by courts of administrative decisions and recommending to the Minister any improvements that might be made in that law or practice.<sup>13</sup>

1.13 The Council's aim in this inquiry was to assess the different mechanisms for seeking review of Australian Government actions and to make recommendations for changes to the system where necessary or desirable. The Council has considered both legislative and non-legislative responses in making recommendations to government. The scope of the Council's inquiry therefore included consideration of:

- the *ADJR Act* as a whole;
- the application of s 39B of the *Judiciary Act 1903* (Cth) (*Judiciary Act*);
- other statutory schemes for reviewing government decisions and actions;
- and

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<sup>9</sup> Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, Report No 41 (1997).

<sup>10</sup> Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2003).

<sup>11</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 51(1)(aa).

<sup>12</sup> *Ibid* s 51(1)(a)–(b).

<sup>13</sup> *Ibid* s 51(1)(c).

- non-statutory materials that support judicial review applications.

## RELATED REPORTS

1.14 In preparing this Report the Council has had regard to a number of related reports. Two reports of relevance to the Australian federal civil justice system were released in 2009: the Report of the Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, and the Report of the National Human Rights Consultation. In 2010, the Law Commission for England and Wales released the Report *Administrative Redress: Public Bodies and the Citizen*, which discussed proposals relating to the reform of judicial review remedies. In early 2011, the Australian Information Commissioner, Emeritus Professor John McMillan AO, conducted an inquiry into judicial review of refugee status assessments of irregular maritime arrivals at the request of the Government. In March 2011, the NSW Department of Justice and Attorney-General released a Discussion Paper, *Reform of Judicial Review in NSW*. This section provides a brief summary of these reports, and how they relate to the Council's current inquiry.

## A Strategic Framework for Access to Justice

1.15 The Access to Justice Taskforce was established in the Australian Government Attorney-General's Department in January 2009 to develop a more strategic approach to, and make recommendations on ways of, improving access to justice for all Australians. The Report of the Access to Justice Taskforce was released on 23 September 2009.<sup>14</sup> The central recommendation, which has been adopted by the Government, was a 'Strategic Framework for Access to Justice'.<sup>15</sup>

1.16 The Australian Government's *Strategic Framework for Access to Justice in the Federal Civil Justice System*<sup>16</sup> sets out key principles to guide justice system reforms and initiatives, as well as resource allocation decisions, in order to facilitate better access to justice. These 'access to justice principles' are: accessibility, appropriateness, equity, efficiency and effectiveness. In November 2009, the Standing Committee of Attorneys-General<sup>17</sup> adopted these principles to guide future decisions affecting civil justice.<sup>18</sup> The principles will be applied by policy makers in any implementation of recommendations resulting from this inquiry.

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<sup>14</sup> Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) Australian Government Attorney General's Department <[www.ag.gov.au/a2j](http://www.ag.gov.au/a2j)>.

<sup>15</sup> *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (24 September 2011) Australian Government Attorney-General's Department <[www.ag.gov.au/a2j](http://www.ag.gov.au/a2j)>.

<sup>16</sup> Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) Australian Government Attorney General's Department <[www.ag.gov.au/a2j](http://www.ag.gov.au/a2j)>.

<sup>17</sup> The Standing Committee of Attorneys-General is now the Standing Council on Law and Justice.

<sup>18</sup> Standing Committee of Attorneys-General (now the Standing Council on Law and Justice), *Communiqué November 2009* (2009) 2.

## National Human Rights Consultation

1.17 The National Human Rights Consultation was conducted by an independent Committee—the National Human Rights Consultation Committee—established by the Australian Government.<sup>19</sup> It aimed to seek a range of views from across Australia about the protection and promotion of human rights. The Committee provided its Report to the Australian Government on 30 September 2009.<sup>20</sup>

1.18 The most significant recommendations for administrative law were: that the *ADJR Act* be amended in such a way as to make the definitive list of Australia’s international human rights obligations a relevant consideration in government decision making; and that the Australian Human Rights Commission (AHRC) President be included as a statutory member of the Council. At the date of this Report, the Australian Government has implemented the second of these recommendations, but not the first. The *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Act* 2011(Cth) amended the *AAT Act* to include the AHRC President as one of the ex officio members.<sup>21</sup> The Australian Government has also produced guidance on human rights for public servants developing legislation, policy or programs.<sup>22</sup>

1.19 The Council considers that the existence of an effective and accessible system of judicial review is essential to maintaining the rule of law and ensuring respect for fundamental human rights. However, the Council does not propose to address the issue of whether human rights should be specifically listed as relevant considerations in the *ADJR Act*. The focus of this inquiry is the framework for judicial review.

## Administrative Redress: Public Bodies and the Citizen

1.20 On 25 May 2010, the Law Commission of England and Wales (Law Commission) published its Report, *Administrative Redress: Public Bodies and the Citizen*.<sup>23</sup> This followed publication of a discussion paper (October 2004),<sup>24</sup> a scoping paper (October 2006)<sup>25</sup> and a consultation paper (3 July 2008),<sup>26</sup> as part of the Law Commission’s review of redress from public bodies for substandard administrative action.

1.21 In its consultation paper, the Law Commission proposed reforms to the court-based common law mechanisms for redress against public bodies in judicial review and private law

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<sup>19</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report* (Commonwealth of Australia, 2009) 3.

<sup>20</sup> Ibid.

<sup>21</sup> This received royal assent on 4 December 2011. Since then, the President of the Human Rights Commission has served on the Council.

<sup>22</sup> Australian Government Attorney-General’s Department, *Human Rights Guidance Sheets* (November 2011) <[www.ag.gov.au/Humanrightsandantidiscrimination/Humanrightsandthepublicsector/](http://www.ag.gov.au/Humanrightsandantidiscrimination/Humanrightsandthepublicsector/)>.

<sup>23</sup> Law Commission (UK) *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010). The report and the papers which preceded it can be downloaded from <[www.lawcom.gov.uk/remedies.htm](http://www.lawcom.gov.uk/remedies.htm)>.

<sup>24</sup> Law Commission (UK) *Monetary Remedies in Public Law: A Discussion Paper* (2004).

<sup>25</sup> Law Commission (UK) *Remedies Against Public Bodies: A Scoping Report* (2006).

<sup>26</sup> Law Commission (UK) *Administrative Redress: Public Bodies and the Citizen, A Consultation Paper*, Consultation Paper No 187 (2008).

claims.<sup>27</sup> The proposed reforms involved the creation of a statutory discretion of the court to award damages against a public body for ‘serious fault’ in making a decision that was objectively intended to confer a benefit on a class of individuals.<sup>28</sup> In the final report, the Law Commission decided not to pursue these proposals due to opposition raised in consultations and the lack of data available to refute or support those criticisms.<sup>29</sup> However, recommendations were made concerning the collation and publication of data about the costs of compensation paid by government.<sup>30</sup> The Law Commission’s recommendations are considered in more detail in Chapter 10.

1.22 Other proposed reforms in the consultation paper were directed at improving access to, and powers of, public sector ombudsmen to aid them in undertaking their role in the redress system for administrative injustice.<sup>31</sup> No recommendations were made about these proposals in the Report. However, the Law Commission will be undertaking a process of further review and consultation in this area.<sup>32</sup>

## **Professor McMillan’s paper on immigration processes**

1.23 On 7 January 2011, the Minister for Immigration and Citizenship, the Hon Chris Bowen MP, announced that the Government had asked Emeritus Professor John McMillan AO to advise the Government on possible options for improving the efficiency and minimising the duration of the judicial review process for irregular maritime arrivals.<sup>33</sup>

1.24 The report, *Regulating Migration Litigation after Plaintiff M61*,<sup>34</sup> was released in November, 2011. The Report:

- did not recommend that Parliament enact a direction to the courts to resolve offshore entry person refugee status determination matters as expeditiously as is reasonable (as a direction of the kind would be ineffective and unnecessary);
- did not recommend removal of the right of appeal from the Federal Magistrates Court to the Federal Court in offshore entry refugee status determination matters; and

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<sup>27</sup> Law Commission (UK) *Administrative Redress: Public Bodies and the Citizen, A Consultation Paper*, Consultation Paper No 187 (2008).

<sup>28</sup> Ibid 75.

<sup>29</sup> Law Commission (UK) *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 21–22.

<sup>30</sup> Ibid 69.

<sup>31</sup> Law Commission (UK) *Administrative Redress: Public Bodies and the Citizen, A Consultation Paper*, Consultation Paper No 187 (2008) 104–116.

<sup>32</sup> Law Commission (UK) *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 70.

<sup>33</sup> John McMillan, ‘Regulating Migration Litigation after Plaintiff M61’ (Report to the Minister for Immigration and Citizenship, November 2011) <[www.immi.gov.au/media/publications/](http://www.immi.gov.au/media/publications/)>.

<sup>34</sup> Ibid.



## Chapter 1: Overview of the Inquiry

- recommended that the Department of Immigration and Citizenship should implement two measures to provide guidance and assistance to offshore entry persons concerning the initiation of judicial review proceedings:
  - prepare an information sheet on judicial review process and rights; and
  - consider adopting a provisional scheme for reimbursing all or part of the legal costs of an offshore entry person in test case litigation that raises a significant legal issue about the Protection Obligations Determination process, or judicial review of actions taken under that process.<sup>35</sup>

1.25 The Government issued a response to Professor McMillan's Report in November 2011, accepting the key recommendations, but stating that it would not pursue the suggestion to consider a provisional test case scheme modelled on the Australian Taxation Office's Test Case Litigation Program.<sup>36</sup>

1.26 However, from 24 March 2012, the Government has implemented a single processing system for both irregular maritime arrivals and air arrivals.<sup>37</sup> Irregular maritime arrivals will now make protection visa applications under the same process as onshore applicants, and protection visa decisions will be subject to review by the Refugee Review Tribunal.<sup>38</sup>

### Reform of Judicial Review in NSW

1.27 In March 2011, the NSW Department of Justice and Attorney General released the discussion paper *Reform of Judicial Review in NSW* for public consultation.<sup>39</sup> As NSW does not have a statutory judicial review right, the discussion paper sought views on whether a statutory review jurisdiction should be established and, if so, which of a number of options for reform of common law judicial review in NSW should be adopted.

### INQUIRY PROCESS

1.28 In May 2011, the Council released a Consultation Paper providing a survey of the current system of judicial review in Australia and seeking views from key stakeholders on various aspects of the judicial review system. In response, the Council received 24 submissions from a wide range of people and organisations, including government agencies,

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<sup>35</sup> John McMillan, 'Regulating Migration Litigation after Plaintiff M61' (Report to the Minister for Immigration and Citizenship, November 2011) 3.

<sup>36</sup> Australian Government, 'Government Response to McMillan Report' (Government release, November 2011) <[www.immi.gov.au/media/publications/pdf/2011/government-response-mcmillan-review-111124.pdf](http://www.immi.gov.au/media/publications/pdf/2011/government-response-mcmillan-review-111124.pdf)>.

<sup>37</sup> Australian Government Department of Immigration and Citizenship, *Implementation of a single process for Irregular Maritime Arrivals (Questions and Answers)* <[www.immi.gov.au/visas/humanitarian/onshore/](http://www.immi.gov.au/visas/humanitarian/onshore/)>.

<sup>38</sup> Ibid.

<sup>39</sup> NSW Department of Justice and Attorney General, *Discussion Paper: Reform of Judicial Review in NSW* (March 2011) <[www.lpcldr.lawlink.nsw.gov.au/lpcldr/lpcldr\\_consultation/lpcldr\\_discussion.html](http://www.lpcldr.lawlink.nsw.gov.au/lpcldr/lpcldr_consultation/lpcldr_discussion.html)>.

## *Federal Judicial Review in Australia*

legal representative groups, tribunals and academics. A list of submissions can be found at **Appendix E**.

1.29 The Council also conducted four days of consultations in Sydney, Melbourne and Canberra with a variety of stakeholders across government and the legal community. A list of consultations carried out is at **Appendix F**.

1.30 After receiving submissions on the Consultation Paper, the Council also sought further views from Australian Government agencies on specific exemptions from the *ADJR Act*.

1.31 In this Report, the Council relies upon statistical information about the judicial review system. The Federal Court has assisted the Council greatly in making statistical information available. The Council was able to obtain some limited data from Australian Government agencies about numbers and type of judicial review applications, in addition to information available publicly in agency annual reports.



## 2. CONTEXT

2.1 In the Council's view, any consideration of judicial review must be placed in the context of the administrative law system in Australia as a whole. As submitted by the Law Society of New South Wales, 'any possible reform of judicial review should be considered keeping in mind the proper roles played respectively by the courts, merit review bodies and decision makers'.<sup>40</sup> This chapter places judicial review in its context. The chapter provides an overview of the historical development of the administrative law system in Australia, the changes to the nature and functions of government since the adoption of the Australian administrative law framework, the current administrative law system and the principles that should guide the development of the system into the future.

### DEVELOPMENT OF THE ADMINISTRATIVE LAW SYSTEM

2.2 In considering the best model for judicial review in Australia, the Council considers that it is essential to understand the rationale for the development of the current system of administrative review.

#### Review of administrative decisions in Australia until the 1970s

2.3 State Supreme Courts in Australia have inherent power as superior courts to conduct judicial review by granting 'prerogative writs' or certain equitable remedies—orders quashing or setting aside a decision, directing or preventing action, or declaring the rights of parties.<sup>41</sup> Section 75(v) of the *Australian Constitution* gave jurisdiction to the High Court to issue remedies against an officer of the Commonwealth 'in all matters in which a writ of Mandamus or prohibition or an injunction is sought'. Section 75(v) therefore retained the focus on remedies or writs that is a feature of judicial review under the common law.

2.4 In 1971, the Commonwealth Administrative Review Committee, in a review chaired by Sir John Kerr (the Kerr Committee), commented that 'there is a complex relationship between the principles of review and the remedies available and technical limitations diminish the effectiveness of remedies which at first sight appear to [be] fairly comprehensive'.<sup>42</sup> In addition, until the Federal Court was established in 1980,<sup>43</sup> the High Court was the sole forum for federal judicial review matters.

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<sup>40</sup> Law Society of New South Wales, Submission 24 (23 June 2011) 1.

<sup>41</sup> The High Court decision in *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 marked a significant change in the way that State Supreme Courts conduct judicial review. This decision is discussed in Chapter 3.

<sup>42</sup> Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) 9–10. For a retrospective analysis of the main themes, see Robin Creyke and John McMillan (eds) *The Kerr Vision of Australian Administrative Law—At the Twenty-Five Year Mark* (Australian National University, 1998).

<sup>43</sup> *Federal Court of Australia Act 1976* (Cth).

2.5 By the early 1970s, a number of administrative review tribunals and other administrative review schemes in specific jurisdictions had been introduced.<sup>44</sup> However, the Kerr Committee identified ‘a need for the establishment of machinery which provides for a more comprehensive review of administrative decisions’.<sup>45</sup>

## Reforms in other jurisdictions

2.6 The *Commonwealth Administrative Review Committee Report* (Kerr Committee Report) discussed administrative law reform in various jurisdictions during the 1960s and 1970s. At this time, the United Kingdom was developing a framework of administrative law comprising the courts, tribunals, a Parliamentary Commissioner for Administration and a Council on Tribunals.<sup>46</sup> Likewise, New Zealand created the Administrative Division of the Supreme Court in 1968, and appointed an Ombudsman in 1962.<sup>47</sup> The United States had enacted the *Administrative Procedures Act* in 1946 after ‘a fervent and sustained debate at the highest levels sparked by the Great Depression’.<sup>48</sup>

## The beginning of an integrated system of review in Australia

2.7 Australian States and Territories began to implement similar reforms in the early 1970s. Between 1971 and 1974, five of the Australian States established Ombudsmen or Parliamentary Commissioners.<sup>49</sup> Reform proposals of a different kind had also been made in Victoria. Two reports in 1968, from the Victorian Statute Law Revision Committee and the Chief Justice’s Law Reform Committee, proposed the creation of a general administrative tribunal, an Ombudsman and a reformed system of judicial review.<sup>50</sup> Academic and judicial commentators in Australia had also spoken in favour of administrative law reform.<sup>51</sup>

2.8 The present Commonwealth system of administrative review can be traced to the report in 1971 of the Kerr Committee. The major features of the present system—the statutory framework for judicial review, the Administrative Appeals Tribunal (AAT), the Commonwealth Ombudsman and, indeed, the establishment of the Administrative Review Council—stem largely from the recommendations of that Committee. In its landmark report in 1971, the Kerr Committee drew attention to the steady development of a vast range of

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<sup>44</sup> Appendix E of the following report provides a list of tribunals and jurisdictions: Committee on Administrative Discretions, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973).

<sup>45</sup> Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) 3.

<sup>46</sup> *Ibid* ch 6.

<sup>47</sup> *Parliamentary Commissioner (Ombudsman) Act 1962* (NZ). See Commonwealth Administrative Review Council, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) ch 7.

<sup>48</sup> Mark Aronson, ‘The Great Depression, this Depression, and Administrative Law’ (2009) 37 *Federal Law Review* 165, 173.

<sup>49</sup> *Ombudsman Act 1974* (NSW); *Parliamentary Commissioner Act 1971* (Qld); *Ombudsman Act 1972* (SA); *Ombudsman Act 1973* (Vic); *Parliamentary Commissioner Act 1971* (WA).

<sup>50</sup> See Commonwealth Administrative Review Council, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) ch 5. Note also the subsequent Report of the NSW Law Reform Commission, *Appeals in Administration*, Report No 16 (1973).

<sup>51</sup> See, eg, articles in R A Woodman (ed) *Record of the Third Commonwealth and Empire Law Conference* (Law Book Co, 1966).

## Chapter 2: Context

administrative discretions that could be exercised in a way that detrimentally affected the life, liberty, property, livelihood or other interests of a person.<sup>52</sup> The Committee concluded that established mechanisms were unable adequately to correct administrative errors and to ensure justice for the individual.

2.9 The major theme underlying the Kerr Committee Report was the need to develop a comprehensive, coherent and integrated system of administrative review.<sup>53</sup> The main recommendations of the Kerr Committee were:

- the establishment of a general merits review tribunal;
- codification of the grounds of judicial review, including clarification of the grounds and simplification of procedures;
- creation of a new superior federal court to have jurisdiction to hear judicial review applications;
- the introduction of an obligation for decision makers to provide a statement of findings of fact and reasons at the request of a person affected by the decision;
- the introduction of an obligation to disclose relevant documents;
- the establishment of a Counsel for Grievances; and
- the establishment of the Administrative Review Council with a continuing role overseeing and monitoring the new system.<sup>54</sup>

2.10 These recommendations form the basis for the major elements of the administrative law system today.

2.11 In this system, courts, tribunals and the ‘General Counsel for Grievances’ (which became the Ombudsman), would all play separate but overlapping roles. As Professors Robin Creyke and John McMillan have noted, the Kerr Committee considered the integration of the whole system to be a key means of creating a unified review system. However, generally speaking, this integration and harmonisation has not occurred.<sup>55</sup> This is because a number of the Kerr Committee recommendations directed towards the integration of the system were never implemented, for example the recommendations that the Ombudsman

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<sup>52</sup> Commonwealth Administrative Review Council, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) 1, 3–4, 6.

<sup>53</sup> Robin Creyke and John McMillan, ‘Administrative Law Assumptions ... Then and Now’ in Robin Creyke and John McMillan (eds) *The Kerr Vision of Australian Administrative Law* (Australian National University, 1998) 1.

<sup>54</sup> Commonwealth Administrative Review Council, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) 112–116.

<sup>55</sup> Robin Creyke and John McMillan, ‘Administrative Law Assumptions ... Then and Now’ in Robin Creyke and John McMillan (eds) *The Kerr Vision of Australian Administrative Law* (Australian National University, 1998) 10–11.

have an advocacy role in courts and tribunals, and that departmental representatives be appointed to tribunals.<sup>56</sup>

2.12 The second key feature of the Kerr Committee's recommendations was the central role that administrative tribunals should play in review of executive action. The Committee downplayed the importance of the role of the courts, seeing judicial review as complementary to merits review, rather than the central feature of the system.<sup>57</sup>

## **Administrative Appeals Tribunal, Ombudsman and a statutory system of judicial review**

2.13 The Committee on Administrative Discretions, chaired by Sir Henry Bland (Bland Committee), was established to advance the Kerr Committee's recommendations, in particular to consider the variety of discretions exercised by the Australian Government and to identify those that should be subject to merits review. The final report of the Bland Committee drew attention to the lack of consistent administrative review, the diversity of tribunal procedures and functions, and the lack of external review in many jurisdictions. The Bland Committee supported the establishment of a general merits review tribunal and a Counsel for Grievances, or Ombudsman.<sup>58</sup>

2.14 The inquiry by the Committee of Review of Prerogative Writ Procedures, chaired by Robert Ellicott QC (Ellicott Committee), examined the Kerr Committee's proposals for a reformed system of judicial review.<sup>59</sup> This Committee was established to review the prerogative writ procedures available in the courts and was primarily concerned with judicial review. The Ellicott Committee endorsed the Kerr Committee's view that the state of the law relating to judicial review of administrative action was technical and complex and in need of reform, simplification and legislative statement.<sup>60</sup> The Ellicott Committee also endorsed the Kerr Committee's recommendation that a Counsel for Grievances be established.

2.15 The recommendations of the Kerr, Bland and Ellicott Committees led to the establishment of the AAT (and the Administrative Review Council) under the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*) and the Ombudsman under the *Ombudsman Act 1976* (Cth) (*Ombudsman Act*), as well as the implementation of a statutory judicial review scheme under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*).

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<sup>56</sup> Robin Creyke and John McMillan, 'Administrative Law Assumptions ... Then and Now' in Robin Creyke and John McMillan (eds) *The Kerr Vision of Australian Administrative Law* (Australian National University, 1998) 10–11.

<sup>57</sup> Commonwealth Administrative Review Council, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971) 67.

<sup>58</sup> Committee on Administrative Discretions, *Final Report of the Committee on Administrative Discretions*, Parl Paper No 316 (1973).

<sup>59</sup> Committee of Review of Prerogative Writ Procedure, *Report of the Committee of Review of Prerogative Writ Procedure*, Parl Paper No 56 (1973).

<sup>60</sup> *Ibid.*

## Freedom of information and privacy laws

2.16 Two interdepartmental committees in 1974<sup>61</sup> and 1976<sup>62</sup> considered the implementation of freedom of information laws in Australia, based on the US *Freedom of Information Act 1966*. The report of the 1976 committee became the basis for the *Freedom of Information Act 1982* (Cth) (*FOI Act*).<sup>63</sup>

2.17 The *Privacy Act 1988* (Cth) (*Privacy Act*) was passed by the Federal Parliament at the end of 1988. The Act gave effect to Australia's agreement to implement guidelines adopted in 1980 by the Organisation for Economic Cooperation and Development (OECD) for the Protection of Privacy and Transborder Flows of Personal Data, as well as its obligations under Article 17 of the International Covenant on Civil and Political Rights.

## CHANGES IN GOVERNMENT SINCE THE 1970S

2.18 This section considers a number of changes in government since the 1970s that have altered the context in which the administrative law system operates and raised new issues for judicial review.

## Increase in legislation

2.19 From 1990 to 2006, the Australian Parliament passed more pages of legislation than were passed during the first 90 years of federation.<sup>64</sup> This increase, of itself, does not necessarily mean that government regulation has grown,<sup>65</sup> but this increase in the amount of legislation is one of the factors contributing to the increase in the volume of discretionary decisions made by public officials. For example, in 2009–10, Centrelink alone had 7.02 million customers and administered 11.4 million individual entitlements.<sup>66</sup> In his study of the growth of the regulatory state, Chris Berg argues, however, that 'technical changes in the manner in which legislation is drafted cannot explain modern legislative and regulatory excess'.<sup>67</sup> Rather, Berg suggests that 'there has been a fundamental shift in the relationship between government and society; in the mechanisms by which policy is conducted; and the institutions where political power resides'.<sup>68</sup>

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<sup>61</sup> Interdepartmental Committee on Proposed Freedom of Information Legislation, *Proposed Freedom of Information legislation: Report of Inter-Departmental Committee* (Australian Government Publishing Service, 1974).

<sup>62</sup> Interdepartmental Committee on Proposed Freedom of Information Legislation, *Policy proposals for freedom of information legislation: Report of Interdepartmental Committee*, (Australian Government Publishing Service, 1976).

<sup>63</sup> Australian Law Reform Commission, *Open Government: A review of the federal Freedom of Information Act 1982*, Report No 77 (1995) 12; Administrative Review Council, *Open Government: A review of the federal Freedom of Information Act 1982*, Report No 40 (1995) 12.

<sup>64</sup> Taskforce on Reducing Regulatory Burdens, Australian Government, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (January 2006) 5.

<sup>65</sup> For example, there have been changes to the formatting of legislation and increased detail in legislation. Increased detail may make the intended operation of the statute clearer and more certain, with less room for variety in judicial interpretation, despite increasing the length of legislation.

<sup>66</sup> Centrelink, *Annual Report 2009–10* (Commonwealth of Australia, 2010).

<sup>67</sup> Chris Berg, *The Growth of Australia's Regulatory State* (Institute of Public Affairs, 2008) 17.

<sup>68</sup> *Ibid* 7.

2.20 There has also been a considerable increase in the number and complexity of legislative instruments—made by the executive government under the authority of an enactment—each year.<sup>69</sup> This increase has seen the development of a new phenomenon—hybrid mechanisms that are part-legislative and part-administrative in nature, blurring the distinction between legislative and administrative actions of the executive government.

2.21 Regulation through ‘soft law’ has also increased since the introduction of the *ADJR Act*. Soft law encompasses rules, guidelines, practices and policies that guide the executive government in its administrative decision making, but do not have the force of law. Greg Weeks submitted to the Council that soft law applies asymmetrically, as ‘it operates as *de facto* hard law on those who are being regulated but is decidedly soft in its effect on the regulators’.<sup>70</sup>

## **Privatisation of government functions**

2.22 While legislation has grown, a contrasting trend is the move during the 1980s and 1990s towards the privatisation of many functions traditionally carried out by government. As Michael Taggart explains:

the privatization movement was said to be a response to budget deficits and mounting public debt, perceived inefficiencies in government operations, and a loss of faith in the ability of governments in the developed world to meet the expectations of their citizenry of an ever-increasing standard of living.<sup>71</sup>

2.23 The theory was that the market, through competition between service providers, could provide higher quality services more efficiently than government and many government services were outsourced to private providers. However, a consequence of such privatisation was to put private providers outside administrative review. Outsourcing was therefore seen by many commentators as a threat to government accountability.<sup>72</sup> While some elements of the federal administrative law system, in particular the Commonwealth Ombudsman, now apply to Australian Government contractors, the reach of judicial review has not extended into the private sector.<sup>73</sup>

2.24 Other jurisdictions deal with this trend in different ways. English courts have been prepared to find that private and domestic bodies that do not exercise statutory powers may

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<sup>69</sup> Chris Berg, *The Growth of Australia's Regulatory State* (Institute of Public Affairs, 2008) 10–16.

<sup>70</sup> Greg Weeks, Submission 8 (1 July 2011) 5.

<sup>71</sup> Michael Taggart, ‘The Changing Nature of the Administrative State’ in Peter Cane and Mark Tushnet (eds) *The Oxford Companion to Legal Studies* (Oxford University Press, 2003) 101.

<sup>72</sup> See, eg, Rachel Livingston, ‘Contracting out of employment services in Australia and administrative law’ (2003) 10 *Australian Journal of Administrative Law* 77; Hannes Schoombee, ‘Judicial Review of Contractual Powers’, in Linda Pearson (ed) *Administrative Law: Setting the Pace or Being Left Behind?* (Australian Institute of Administrative Law, 1997) 433; David De Carvalho, ‘Social contract renegotiated: Protecting public law values in the age of contracting’ (2001) 28 *ALAL Forum* 1; Margaret Allars, ‘Private law but public power: Removing administrative law review from government business enterprises’ (1995) 6 *Public Law Review* 44.

<sup>73</sup> See, eg, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.



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nevertheless be amenable to judicial review.<sup>74</sup> The focus of the English courts is on government power, although it has been admitted this can be as much a matter of ‘feel’ as deciding whether criteria are met.<sup>75</sup> In South Africa, the *Promotion of Administrative Justice Act 2001* applies to ‘a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect’.<sup>76</sup> The South African courts therefore focus on whether the body or person made the decision while exercising public power or performing a public function.

### Increase in the number and powers of regulatory bodies

2.25 Berg notes that Australia has seen an increase in the number and powers of government regulatory bodies, such as the Australian Securities and Investment Commission, the Australian Consumer and Competition Commission, the Australian Prudential Regulation Authority, the Insolvency and Trustee Service Australia and the Australian Energy Regulator.<sup>77</sup> This is significant to administrative law in that those affected by regulatory decisions will usually be corporations, rather than individuals, and more likely to challenge government decisions in the courts.

### Technological developments

2.26 Technology now plays a significant role in government decision making. This has assisted governments to deal with the increase in the volume of decisions being made, but has also changed the manner in which decisions are made.

2.27 The development of computer systems that can make decisions or guide decision makers has raised new issues for administrative law. ‘Automated decision making’ has the potential to lead to greater accuracy and consistency in decision making—for example through limiting the potential for irrelevant factors to be taken into account. However, automated decision making also has a number of potential pitfalls—for example, narrowing the discretion granted by a statute or the possibility of discrepancies arising over time between the computer system and the legislation.

2.28 The Council considered the issues associated with automated decision making in 2004.<sup>78</sup> The Australian Government developed a best practice guide based on the Council’s report.<sup>79</sup>

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<sup>74</sup> *R v Panel on Take-overs and Mergers; Ex parte Datafin* [1987] QB 815, 824–825. The Court of Appeal found that the Take-overs Panel—which was part of a system of self-regulation ‘without visible means of legal support’, which had ‘no statutory, prerogative or common law powers’ and was ‘not in contractual relationship with the financial market or with those who deal in that market’—could be subject to judicial review.

<sup>75</sup> *R (Tucker) v Director General of the National Crime Squad* [2003] ICR 599, [13] (Scott Baker LJ).

<sup>76</sup> *Promotion of Administrative Justice Act 2001* (South Africa) s 1.

<sup>77</sup> Chris Berg, *The Growth of Australia’s Regulatory State* (Institute of Public Affairs, 2008) 20.

<sup>78</sup> Administrative Review Council, *Automated Assistance in Administrative Decision Making*, Report No 46 (2004).

<sup>79</sup> Australian Government Information Management Office, *Automated Assistance in Administrative Decision Making: Best Practice Guide* (Commonwealth of Australia, 2007).

## THE CURRENT SYSTEM OF ADMINISTRATIVE LAW IN AUSTRALIA

2.29 This section describes the current administrative law system in Australia as well as other mechanisms for improving government decision making. This is followed by a consideration of how different elements of the administrative law system accord with the underlying principles of the system. The Australian administrative law system consists of mechanisms for reviewing Australian Government decisions and for improving the future conduct of Australian Government officers and agencies.

2.30 There are also a number of other mechanisms available for individuals seeking redress from government, in particular discretionary compensation mechanisms and private legal actions. All fulfil different and complementary roles in the administrative law system. To provide a comprehensive consideration of judicial review, these are also considered, recognising that there are a range of mechanisms for review of government decisions and actions.

### Review of government decisions

2.31 In the federal administrative law system, there are four main mechanisms for review and oversight of administrative government decision making:

- internal merits review;
- external merits review (including tribunals and the Office of the Australian Information Commissioner);
- administrative investigation (for example the Ombudsman); and
- judicial review.

#### *Merits review*

2.32 Merits review is the process by which a person or body, other than the primary decision maker, reconsiders the facts, law and policy aspects of the original decision and determines the correct or preferable decision.<sup>80</sup> In merits review, a new decision can be made after review of the facts. This is different from judicial review, where only the legality of the decision making process is considered.

2.33 In *Drake v Minister for Immigration and Ethnic Affairs*, Bowen CJ and Deane J held that ‘the question for the determination of [a] Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.’<sup>81</sup> Kiefel J summarised the task of a merits review body in *Shi v Migration Agents Registration Authority* as ‘reach[ing] its conclusion, as to what is the correct decision, by conducting its own, independent assessment and

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<sup>80</sup> See the discussion in Administrative Review Council, *What decisions should be subject to merits review* (Commonwealth of Australia, 1999) 1.

<sup>81</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589. Approved by the High Court in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 307 (Kirby J) 314–15 (Heydon and Hayne JJ) 327 (Kiefel J).



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determination of the matters necessary to be addressed'.<sup>82</sup> In the Council's guide, *What Decisions should be Subject to Merits Review*, the Council explained that a decision is 'correct' in the sense of being made according to law and preferable in the sense that it is the best decision that could have been made on the basis of the relevant facts.<sup>83</sup> It is directed to ensuring fair treatment of all persons affected by a decision, and improving the quality and consistency of primary decision making.<sup>84</sup>

2.34 *Internal review* occurs when a decision made by an officer of an agency is reviewed by another person in the agency. Many agencies have some formal system of internal review; others have more ad hoc systems. Internal review can be sought by requesting reconsideration of a decision or by following set procedures where more formal mechanisms exist. Internal review may be stipulated in legislation or may be available through administrative processes in an agency. For example, Division 2 of the *Social Security Administration Act 1999* (Cth) grants the Secretary a delegable power to review most decisions made 'under the social security law',<sup>85</sup> and to affirm, vary or set aside a decision. Section 129 sets out the procedure for making an application.

2.35 *External review* involves a fresh consideration of a case by an external body. This body is often a tribunal, but may also be a regulator reviewing the decision of a private body given decision-making power by legislation, or an independent officer from another agency. External merits review has to be provided for by legislation; it is not available without specific prescription. For example, the *Social Security Administration Act 1999* (Cth), Division 3, grants the Social Security Appeals Tribunal (SSAT) the jurisdiction to review most decisions made under social security law. Division 3 also sets out the powers of the SSAT, the procedures for making an application and the effect of SSAT decisions. The Administrative Appeals Tribunal (AAT) was established by the *AAT Act*, setting out the AAT's powers and functions. However, jurisdiction is also conferred on the AAT by particular statutes, for example, Division 5 of the *Social Security Administration Act 1999* (Cth).

### *Administrative investigation*

2.36 The Commonwealth Ombudsman has wide powers to investigate complaints about the administrative actions and decisions of most Australian Government agencies to consider if they are unreasonable, unjust, wrong, unlawful or discriminatory.<sup>86</sup> Under the *Ombudsman Act*, the Ombudsman can also investigate complaints about government contractors providing goods and services to the public under a contract with a government agency. Ombudsman investigation and review is available for all administrative and decision-making processes of agencies within the Ombudsman's jurisdiction.<sup>87</sup> The Ombudsman has

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<sup>82</sup> *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 327.

<sup>83</sup> Administrative Review Council, *What decisions should be subject to merits review?* (Commonwealth of Australia, 1999) 1.

<sup>84</sup> Ibid.

<sup>85</sup> The *Social Security Administration Act 1999* (Cth) s 3, defines 'the social security law' as including the *Social Security Administration Act 1999* (Cth) the *Social Security Act 1991* and any other act expressed to be part of the social security law.

<sup>86</sup> *Ombudsman Act 1976* (Cth) s 15.

<sup>87</sup> Ibid s 5.

the discretion not to investigate a complaint.<sup>88</sup> The Ombudsman can also conduct ‘own motion’ investigations.<sup>89</sup> The remedies offered by the Ombudsman are: recommendations to departments; specific reports to the Government; or broader reports making recommendations to the Government about systemic problems.<sup>90</sup>

2.37 Other Australian Government agencies may have an investigative function that is comparable to that of the Ombudsman. For example, the Australian Human Rights Commission (AHRC) may investigate whether Commonwealth administrative activity complies with human rights or anti-discrimination standards. Section 11 of the *Australian Human Rights Commission Act 1986* (*AHRC Act*) gives the AHRC the following relevant functions:

- to inquire into, and attempt to conciliate, complaints of unlawful discrimination;
- to inquire into any act or practice, including any systematic practice, that may constitute ‘discrimination’ in employment or occupation; and
- to inquire into any act or practice that may be inconsistent with or contrary to any human right.

2.38 Section 8(6) of the *AHRC Act* requires that the function of the AHRC under each of these provisions be performed by the President. The President may not delegate his or her powers with respect to: unlawful discrimination;<sup>91</sup> and acts or practices that may be inconsistent with or contrary to human rights, or that relate to equal opportunity in employment.<sup>92</sup>

2.39 The AHRC resolves many complaints through conciliation,<sup>93</sup> but reports to the relevant Minister or body may recommend specific action, including the payment of compensation.<sup>94</sup> After the President has terminated a complaint and given notice of the termination, any person who was an affected person in relation to the complaint may apply to the Federal Court or the Federal Magistrates Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.<sup>95</sup> The Federal Court can make a variety of orders including a declaration that the respondent has committed unlawful discrimination, orders requiring the respondent to perform an action and orders for damages.<sup>96</sup>

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<sup>88</sup> *Ombudsman Act 1976* (Cth) s 6.

<sup>89</sup> *Ibid* s 5.

<sup>90</sup> *Ibid* s 15.

<sup>91</sup> *Australian Human Rights Commission Act 1986* (Cth) s 19(2A).

<sup>92</sup> *Ibid* s 19(2B)—except to the Human Rights Commissioner.

<sup>93</sup> Australian Human Rights Commission, *Conciliation – How it works* <[www.hreoc.gov.au/complaints\\_information/conciliation.html](http://www.hreoc.gov.au/complaints_information/conciliation.html)>.

<sup>94</sup> *Australian Human Rights Commission Act 1986* (Cth) ss 29, 35.

<sup>95</sup> *Ibid* s 46PO.

<sup>96</sup> *Ibid*.

### *Judicial review*

2.40 Judicial review is a review by a court of a decision to determine whether it was made within the lawful limits of the decision maker's authority including, where necessary, in compliance with the requirement of procedural fairness. It is not a re-hearing of the merits of a particular case. Judicial review in Australia is discussed in Chapter 3.

### **Accessing and protecting information**

2.41 The administrative law system includes a number of mechanisms relating to the maintenance, publication and access to government information, including:

- the *FOI Act*;
- the *Archives Act 1983* (Cth);
- the *Privacy Act*; and
- the right to request reasons in the *ADJR Act* or in relation to decisions subject to review in the AAT.

2.42 Major reforms to the *FOI Act*<sup>97</sup> in 2010 implemented recommendations of the Australian Law Reform Commission (ALRC) and the Council in the joint report, *Open Government: A review of the federal Freedom of Information Act 1982*.<sup>98</sup> The 2010 reforms established a new statutory office of the Australian Information Commissioner.<sup>99</sup>

2.43 Currently, there are Information Privacy Principles which set out how the Government is to treat personal information and the circumstances in which agencies can pass the information to someone else.<sup>100</sup> In 2008 the ALRC in its report, *For Your Information: Australian Privacy Law and Practice*,<sup>101</sup> recommended major reforms to Australian privacy law. The Australian Government has released a first stage response to 197 of the ALRC's recommendations.<sup>102</sup> On 24 June 2010, the Australian Government released an exposure draft of legislation containing the proposed Australian Privacy Principles, unifying the Information Privacy Principles and the National Privacy Principles.<sup>103</sup> The exposure draft was referred to the Senate Finance and Public Administration Committee, which reported on

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<sup>97</sup> *Freedom of Information Amendment (Reform) Act 2010* (Cth); *Australian Information Commissioner Act 2010* (Cth).

<sup>98</sup> Australian Law Reform Commission, *Open Government: A review of the federal Freedom of Information Act 1982*, Report No 77 (1995); Administrative Review Council, *Open Government: A review of the federal Freedom of Information Act 1982*, Report No 40 (1995).

<sup>99</sup> *Australian Information Commissioner Act 2010* (Cth).

<sup>100</sup> *Privacy Act 1988* (Cth) s 14.

<sup>101</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008).

<sup>102</sup> Australian Government, *Enhancing National Privacy Protection: Australian Government first stage response to the Australian Law Reform Commission Report 108*, October 2009.

<sup>103</sup> Australian Government, Australian Privacy Principles—Exposure Draft, Australian Privacy Principles—Companion Guide. Available at Senate Finance and Administration Committees, Exposure Drafts of Australian Privacy Amendment Legislation Senate of the Parliament of Australia <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=fapa\\_ctte/priv\\_exp\\_drafts/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=fapa_ctte/priv_exp_drafts/index.htm)>.

15 June 2011, broadly supporting the principles, with some recommendations for changes.<sup>104</sup> On 31 January 2011, the Government also referred the Credit Reporting provisions to the Committee to consider.<sup>105</sup> The Committee released its report on 6 October 2011.<sup>106</sup> On 23 May 2012, the Attorney-General introduced the Privacy Amendment (Enhancing Privacy Protection) Bill 2012 into Parliament, incorporating the Australian Privacy Principles and credit reporting provisions, as well as other key aspects of the Government's first stage response to the ALRC report. On 1 November 2010, the Office of the Privacy Commissioner was integrated into the Office of the Australian Information Commissioner (OAIC).<sup>107</sup>

2.44 Under the *Australian Information Commissioner Act 2010* (Cth), the Australian Information Commissioner has significant merits review and investigation powers, as well as a role in developing information policy in the Australian Government.<sup>108</sup> In addition, the Australian Information Commissioner's statutory function, supported by the Freedom of Information Commissioner, includes promoting awareness and understanding of the Freedom of Information legislation among both agencies and the public.<sup>109</sup> An example of the merits review powers of the Australian Information Commissioner is the review of decisions concerning applications for access to Government information or records under the *Freedom of Information Act*.<sup>110</sup> Such decisions may also be reviewed by the AAT, either following a decision by the Australian Information Commissioner, or on referral by the Information Commissioner.<sup>111</sup> A person may complain to OAIC if he or she is concerned about how the Government collects and handles personal information.<sup>112</sup>

## Other accountability mechanisms

2.45 There are a variety of other agencies, policies and legal remedies that are not part of the administrative law system, but which also serve to keep the Government accountable for its conduct and decision making. The Council does not propose to recommend reforms to these broader elements of the system, but considers it important to recognise the role these mechanisms play when considering what judicial review can—and should—achieve in relation to ensuring government accountability. These include: agencies that provide accountability for executive conduct; mechanisms that provide accountability for legislative frameworks; other compensation mechanisms; and private legal action. Each is considered briefly here.

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<sup>104</sup> Finance and Public Administration Legislation Committee, Parliament of Australia, *Exposure Drafts of Australian Privacy Amendment Legislation: Part 1 – Australian Privacy Principles* (2011).

<sup>105</sup> Credit Reporting—Exposure Draft, Credit Reporting—Companion Guide (2010). Available at Senate Finance and Administration Committees, Exposure Drafts of Australian Privacy Amendment Legislation Senate of the Parliament of Australia <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=fapa\\_ctte/priv\\_exp\\_drafts/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=fapa_ctte/priv_exp_drafts/index.htm)>.

<sup>106</sup> Finance and Public Administration Legislation Committee, Parliament of Australia, *Exposure Drafts of Australian Privacy Amendment Legislation: Part 2—Credit Reporting* (2011).

<sup>107</sup> *Australian Information Commissioner Act 2010* (Cth) ss 6, 7, 9, 12, 14.

<sup>108</sup> *Ibid* s 7.

<sup>109</sup> *Ibid* s 8.

<sup>110</sup> *Freedom of Information Act 1982* (Cth) Part VII.

<sup>111</sup> *Ibid* Part VIII. Section 57A gives the AAT the power to review either decisions made by the Information Commissioner or agency decisions which the Information Commissioner declares inappropriate for review by the Information Commissioner.

<sup>112</sup> *Privacy Act 1988* (Cth) s 36.

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### *Accountability for executive conduct*

2.46 There are a number of agencies, which seek to improve government decision making, that are not considered a part of the administrative law system but rather form a part of the broader ‘administrative justice’ system. The Auditor-General, for example, conducts independent assessments of selected areas of public administration for Parliament.<sup>113</sup> The Auditor-General also provides government agencies with objective assessments of areas where improvements can be made in public administration and service delivery.<sup>114</sup> These reports are made public, and agencies report progress in annual reports.

### *Accountability for executive rule making*

2.47 The *Legislative Instruments Act 2003* (Cth) (*Legislative Instruments Act*) is designed to introduce a consistent system for the registration, tabling, scrutiny and sunseting of all Commonwealth legislative instruments.<sup>115</sup> The *Legislative Instruments Act* requires:

- consultation during the making of instruments;<sup>116</sup>
- public accessibility through registration on the Federal Register of Legislative Instruments;<sup>117</sup>
- parliamentary scrutiny through the disallowance process;<sup>118</sup> and
- ‘sunsetting’—a process by which all legislative instruments automatically cease after 10 years.<sup>119</sup>

2.48 The *Human Rights (Parliamentary Scrutiny) Act 2012* (Cth) introduced a requirement for all Bills and disallowable legislative instruments to be accompanied by a Statement of Compatibility. The Statement of Compatibility contains an assessment of whether the Bill or legislative instrument is compatible with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified.

2.49 Parliamentary committees also play an important role in scrutinising legislation that is before Parliament. Both the Senate Standing Committee on the Scrutiny of Bills and the Senate Standing Committee on Regulations and Ordinances scrutinise all bills and instruments that Parliament is considering but have not yet passed into law in accordance with relevant standing orders, and report back to the Senate.

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<sup>113</sup> For example, beginning in 2007–08, an annual program was established in conjunction with the Defence Materiel Organisation (DMO) to enable the Australian National Audit Office to review and report to the Parliament on the status of major Defence acquisition projects: <[www.anao.gov.au/Publications/Assurance-Activities](http://www.anao.gov.au/Publications/Assurance-Activities)>.

<sup>114</sup> See for example Australian National Audit Office, *Centrelink's Role in the Process of Appeal to the Social Security Appeals Tribunal and to the Administrative Appeals Tribunal*, Report No 16 (2010); Australian National Audit Office, *Northern Territory Night Patrols*, Report No 32 (2011).

<sup>115</sup> Explanatory Memorandum, *Legislative Instruments Bill 2003*, 2.

<sup>116</sup> *Legislative Instruments Act 2003* (Cth) Part 3.

<sup>117</sup> *Ibid* Part 4.

<sup>118</sup> *Ibid* Part 5. Parliament has 15 sitting days to consider a legislative instrument and members can move to have the instrument ‘disallowed’ during this period, invalidating the instrument: s 42.

<sup>119</sup> *Ibid* Part 6.

## *Federal Judicial Review in Australia*

2.50 The Senate Standing Committee on the Scrutiny of Bills assesses whether bills before the parliament:

- trespass unduly on personal rights and liberties;
- make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegate legislative powers; or
- insufficiently subject the exercise of legislative power to parliamentary scrutiny.<sup>120</sup>

2.51 The Senate Standing Committee on Regulations and Ordinances assesses legislative instruments tabled in Parliament against principles set out in Standing Order 23 and considers whether delegated legislation:

- is in accordance with the statute;
- trespasses unduly on personal rights and liberties;
- makes rights unduly dependent on administrative decisions which are not subject to independent review of their merits; or
- contains matters more appropriate for parliamentary enactment.

2.52 The Joint Committee on Human Rights established on 13 March 2012 also examines Bills and legislative instruments for compatibility with human rights.

### *Other compensation mechanisms*

2.53 There are also discretionary compensation mechanisms that the Government can use to provide compensation when a person suffers some loss or detriment because of government administration. Judicial review remedies do not include an award of damages, and these schemes may provide compensation to individuals where no appropriate legal remedy is available and an individual has suffered loss or damage. There are three main schemes for providing discretionary compensation: the Scheme for Compensation for Detriment caused by Defective Administration (CDDA); ‘act of grace payments’; and ‘ex gratia payments’.<sup>121</sup> The Finance Minister, or delegate, also has the power to waive an amount owing to the Commonwealth.<sup>122</sup>

2.54 The Department of Finance and Deregulation states that ‘the authority to make CDDA payments comes from the executive power of the Commonwealth under s 61 of the

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<sup>120</sup> Senate Standing Order 24, Parliament of Australia.

<sup>121</sup> Department of Finance, *Discretionary Compensation and Waiver of Debt Mechanisms*, Finance Circular 2009/09 (Commonwealth of Australia, 2009).

<sup>122</sup> *Financial Management and Accountability Act 1997* (Cth) s 34(1)(a).



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*Constitution*'.<sup>123</sup> Under the CDDA, ministers and other authorised officials in agencies governed by the *Financial Management and Accountability Act 1997* (Cth) (*FMA Act*) may 'compensate individuals or other bodies that have experienced losses caused by an agency's defective administration'.<sup>124</sup>

2.55 'Act of grace' payments may be made under s 33 of the *FMA Act*. Section 33 allows the Finance Minister or delegate to authorise one-off and periodic payments to individuals if considered appropriate because of special circumstances, such as where government legislation or policy has had unintended and unacceptable consequences in a particular person's circumstances.<sup>125</sup> As the Department of Finance explains, act of grace payments are generally available when the Government has a moral, rather than a legal, obligation to provide compensation for some harm caused by government administration.<sup>126</sup> For example, act of grace payments may be appropriate where the application of Commonwealth legislation or policy has resulted in an 'unintended, anomalous, inequitable or otherwise unacceptable result in the applicant's circumstances',<sup>127</sup> and those circumstances were specific to the applicant, outside the applicant's control and consistent with the broad purpose of the legislation.<sup>128</sup>

2.56 'Ex gratia' payments may be made by the Prime Minister and/or the Cabinet under the authority of s 61 of the *Constitution*. Such payments are typically used to deliver financial assistance at short notice, often to groups of people rather than individuals.<sup>129</sup> The Australian National Audit Office gives the example of payments made by the Commonwealth to persons affected by the Bali bombing in October 2002.<sup>130</sup>

2.57 On 6 December 2010 the Senate Legal and Constitutional Affairs References Committee published a review of Australian Government compensation payments.<sup>131</sup> The review recommended that the Department of Finance should investigate the extension, in appropriate circumstances, of the CDDA to agencies governed by the *Commonwealth Authorities and Corporations Act 1997* (Cth) and to third parties performing functions or providing services on behalf of the Australian Government.<sup>132</sup>

### *Private legal action*

2.58 Private law remedies are usually directed at compensating an individual for loss suffered as a result of a particular wrong. In some cases a private legal action against

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<sup>123</sup> Department of Finance, *Discretionary Compensation and Waiver of Debt Mechanisms*, Finance Circular 2009/09 (Commonwealth of Australia, 2009) 2.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid 23–24.

<sup>126</sup> Ibid 3.

<sup>127</sup> Ibid 24.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid 4.

<sup>130</sup> Australian National Audit Office, *Compensation Payments and Debt Relief in Special Circumstances*, Audit Report No 35 (2004).

<sup>131</sup> Senate Legal and Constitutional References Committee, Parliament of Australia, *Review of Government Compensation Payments* (2010).

<sup>132</sup> Ibid 53.

Government may be an alternative to a judicial review application. Remedies may be available in contract where a person has a contractual relationship with the Government. Public officials may be held accountable in damages under the torts of negligence, breach of statutory duty or misfeasance in public office.

2.59 Emeritus Professor Carol Harlow observed that tort law has ‘an ancient lineage’ of complaints of abuse of power.<sup>133</sup> Damages are available for negligence on the part of public authorities if a plaintiff can show that the authority owed the plaintiff a duty of care, breached that duty and caused the plaintiff damage. Professor John CP Goldberg states that ‘the possibility of liability will hinge on the nature of the activity in question’.<sup>134</sup> For example, discretionary questions of policy are unlikely to give rise to liability, whereas the careless application of a policy may give rise to liability.<sup>135</sup> To show a breach of statutory duty, the claimant must show that Parliament intended a private action to be available for breach of the duty. The High Court considered the tort of misfeasance in public office in *Northern Territory of Australia v Mengel*.<sup>136</sup> Deane J identified the requisite elements of the offence as an unauthorised act by a public official, done maliciously in the exercise of his or her public duties, which causes loss or harm to the plaintiff.<sup>137</sup> The majority noted that the act can be performed either with knowledge, or where the official ‘recklessly disregards the means of ascertaining the extent of his or her power’.<sup>138</sup>

## PRINCIPLES AND PURPOSE

2.60 Any reform to judicial review must be considered in the context of the principles of the administrative law system as a whole, and the aims of the system. The Council has, on previous occasions, identified a number of general principles underlying the administrative law system. The Council relies on these to provide a context for the principles and purpose of judicial review, acknowledging that judicial review alone cannot support all of the principles of the administrative law system.

### Administrative law system principles

2.61 As Professors Robin Creyke and John McMillan observe, the original purpose of the administrative law system as envisaged by the Kerr and Bland Committees was to protect citizens against government at a time when the Australian Government was growing in size

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<sup>133</sup> Carol Harlow, ‘A Punitive Role for Tort Law?’ in Michael Taggart, Linda Pearson and Carol Harlow (eds) *Administrative Law in a Changing State* (Hart Publishing, 2008) 247, 248.

<sup>134</sup> John C P Goldberg, ‘Tort’ in Peter Cane and Mark Tushnet (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 21, 37. For a general discussion and critique of the current legal tests—common law and legislative—for determining whether government entities owe a duty of care see Mark Aronson, ‘Government Liability in Negligence’ (2008) 32 *Melbourne University Law Review* 44.

<sup>135</sup> Ibid.

<sup>136</sup> (1995) 185 CLR 307.

<sup>137</sup> *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, 370 (Deane J); *Commonwealth of Australia v Fernando* [2012] FCAFC 18.

<sup>138</sup> *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).



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and exercising more administrative authority and discretionary power.<sup>139</sup> The administrative law system is also superimposed upon a constitutional framework for judicial review that has regard to public law values such as the rule of law, the safeguarding of individual rights and executive accountability.

2.62 In a number of previous reports, the Council identified the general principles underlying the administrative law system as: ‘lawfulness, fairness, rationality, openness and efficiency’.<sup>140</sup>

2.63 Drawing on these principles, the Council has previously identified the two primary goals of the administrative law system as:

- improving the quality, efficiency and effectiveness of government decision making generally; and
- enabling people to test the legality and the merits of decisions that affect them.<sup>141</sup>

2.64 These two goals are based on the principles underlying the system. By improving the quality, efficiency and effectiveness of government decision making, the administrative law system assists the Government to make lawful, fair and rational decisions, to interact openly with the public and to follow efficient processes. By enabling the legality and merits of decisions to be tested, the administrative law system provides mechanisms for individuals to test whether decisions that affect them were lawful, fair and rational. Each element of the system, discussed above, works to achieve one or both of these goals.

2.65 The Council also considers that the accessibility of the administrative law system is an important principle which should be added to this list. This section outlines how different elements of the administrative law system support different principles.

### *Lawfulness*

2.66 Judicial review is generally concerned with the lawfulness of an administrative decision. As Brennan J stated in *Church of Scientology v Woodward*:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.<sup>142</sup>

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<sup>139</sup> Robin Creyke and John McMillan, ‘Administrative Law Assumptions ... Then and Now’ in Robin Creyke and John McMillan (eds) *The Kerr Vision of Australian Administrative Law* (Australian National University, 1998) 1.

<sup>140</sup> See Administrative Review Council, *Automated Assistance in Administrative Decision Making, Report to the Attorney-General*, Report No 46 (November 2004) 3; Administrative Review Council, *The Coercive Information-Gathering Powers of Government Agencies*, Report No 48 (2008) 2; Administrative Review Council, *Administrative Review Council Thirty-Third Annual Report 2008-09* (Commonwealth of Australia, 2009).

<sup>141</sup> Administrative Review Council, *Overview of the Commonwealth System of Administrative Review* (2011) <<http://www.arc.ag.gov.au/Aboutus/Pages/OverviewoftheCommonwealthSystemofAdminReview.aspx>>.

<sup>142</sup> (1982) 154 CLR 25, 70.

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2.67 Through judicial review, courts can ensure that public officials do not exceed their powers, and can provide remedies when officials overstep those bounds. Specialist external review bodies, such as the AAT, also have significant legal expertise, contributing to lawful government decision making.

### *Fairness and rationality*

2.68 Fair and rational decision making is achieved through a number of elements of the administrative law system, including: legal standards being applied to decision-making procedures through judicial review; finding the ‘correct or preferable decision’ through external merits review; and investigations conducted by various accountability agencies.

2.69 Judicial review principles themselves illustrate what ‘fairness’ and ‘rationality’ require in terms of an administrator’s actions. For example, the rules of natural justice or procedural fairness set out certain procedures which must be followed in order to afford a person a fair hearing in particular cases. Other grounds of judicial review require a decision maker to take into account relevant considerations, ascertained by reference to the Commonwealth law in question, and not take into account irrelevant considerations when making a decision. While, as Creyke and McMillan point out, there have been limited studies of the normative effect achieved by judicial review,<sup>143</sup> it has also been observed that the grounds of judicial review, and interpretation of statutory powers by the courts, have had a profound effect on government decision-making processes over the years and on what fairness and rationality mean in particular cases.<sup>144</sup>

### *Openness*

2.70 Freedom of information legislation supports the principle of openness in government decision making. Public reporting of the decisions of merits review tribunals and courts also contributes to openness.

### *Access and efficiency*

2.71 The range of review mechanisms available contributes to the efficiency and accessibility of the administrative law system, by providing avenues for people to hold government accountable for its conduct. In particular, complaints can be made to the Ombudsman free of charge, and applications for merits review can be made to the Information Commissioner without any cost. Internal review usually involves no cost and provides an accessible means of having a decision reviewed.

2.72 In order to uphold the rule of law effectively, judicial review must be open and accessible to individuals. However, access to justice is a nuanced idea, and closely related to the principle of ‘efficiency’. In order for individuals to have access to judicial review, the Council considers that the system cannot be overwhelmed with cases more appropriately

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<sup>143</sup> Robin Creyke and John McMillan, ‘Judicial review outcomes: an empirical study’ (2004) 11 *Australian Journal of Administrative Law* 82.

<sup>144</sup> Andrew Metcalfe, ‘Administrative law evolution: an administrator’s point of view’ (2010) *Admin Review* 42.

## Chapter 2: Context

dealt with elsewhere. The Australian Government *Strategic Framework for Access to Justice in the Federal Civil Justice System* sets out a number of principles to guide justice system reforms and initiatives, as well as resource allocation decisions, in order best to achieve access to justice.

2.73 These principles are accessibility, appropriateness, equity, efficiency and effectiveness:

- *Accessibility* refers to the creation of mechanisms to allow people to understand and exercise their rights, and includes the idea that justice initiatives should reduce the complexity of the system to make this task easier;
- *Appropriateness* refers to the structure of the justice system: the system should be structured to create incentives to encourage people to resolve disputes at the most appropriate level and in the most appropriate way (for example not using a legal mechanism to try to solve what is fundamentally not a legal problem);
- *Equity* refers to making the system accessible to all and not dependent on private legal representation;
- *Efficiency* refers to the fact that fair outcomes should be achieved in the most efficient way possible, usually without resort to formal dispute resolution processes; and
- *Effectiveness* refers to the interaction of elements in the justice system and ensuring that all elements of the system working together achieve the best outcome for users.<sup>145</sup>

2.74 Judicial review may not be the most appropriate forum for resolving a dispute between the government and the individual, at least at the first instance. Internal and external merits review may be more effective and efficient means of disputing government decisions, because agencies are best placed to explain directly to the individual the reasons for decisions. Tribunals also will often have in place dispute management systems to resolve issues in a less formal way. Ultimately, agencies and tribunals can remake the decision on the merits of the case.

### Principles for judicial review

2.75 In the broader context of the administrative law system, the Council considers it appropriate to restate the core principles to which *judicial review* gives effect. The Council utilises these principles to assess issues such as the best models for review, the appropriateness of exclusions from review, the appropriateness of separate statutory schemes and the ambit of review. The constitutional basis for judicial review in Australia means that principles such as the separation of powers and the rule of law are guiding principles for the

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<sup>145</sup> Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: A guide for future action*, September 2009, 7–8.

## *Federal Judicial Review in Australia*

courts considering judicial review applications. The principles below are policy principles to guide the design of the system.

2.76 The Council considers that the principles underlying judicial review are:

- *Reviewability*—that the lawfulness of government executive action should be subject to review by the courts;
- *Certainty*—that the standards of lawfulness set out in judicial review legislation and by the courts should provide guidance to government officials as to the proper limits of their power, and therefore should be as clear as possible to officials exercising powers;
- *Accessibility*—that judicial review should be accessible to those whose interests are directly affected by government decisions, in the context of the whole administrative review system, noting that different aspects of the administrative review system are appropriate for different purposes and at different stages in the review process; and
- *Efficiency*—that judicial review mechanisms should operate as efficiently as possible.

2.77 The Council has used these principles in developing recommendations for the future direction of federal judicial review. The principles underlie the Council's analysis and conclusions in the following chapters.

# 3. FEDERAL JUDICIAL REVIEW IN AUSTRALIA

## INTRODUCTION

3.1 This chapter examines the various sources of judicial review in the Australian federal jurisdiction. These are:

- constitutional judicial review in the High Court under s 75(v) of the *Australian Constitution*;
- the statutory equivalent of s 75(v) of the *Constitution*, conferred on the Federal Court by s 39B(1) of the *Judiciary Act 1903* (Cth) (*Judiciary Act*);
- the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*);
- alternative sources of judicial review under s 75(iii) of the *Constitution* and s 39B(1A)(c) of the *Judiciary Act*; and
- other specific statutory appeal or review mechanisms.

3.2 These mechanisms share common law origins, both in terms of the grounds of review and remedies, and the underlying principles of judicial review such as the rule of law and the principle of legality. This Chapter discusses the scope of each jurisdiction, and the different grounds of review, standing to seek review, and the remedies that are available.

3.3 In this Report, the Council uses the term ‘constitutional judicial review’ to refer to judicial review under s 75(v) of the *Constitution* and s 39B of the *Judiciary Act*. This recognises that despite the origins of constitutional judicial review in the inherent powers of superior courts to grant prerogative remedies, in the Australian federal context the source of the High Court’s jurisdiction is granted by s 75(v) of the *Constitution*, and the Federal Court’s jurisdiction under s 39B of the *Judiciary Act* mirrors the constitutional provision. In this Report, the term ‘statutory judicial review’ refers to review powers otherwise granted to the courts by statute—primarily the *ADJR Act* but including other statutory judicial review mechanisms.

## CONSTITUTIONAL JUDICIAL REVIEW

3.4 This section outlines constitutional judicial review under s 75(v) of the *Constitution* and its statutory equivalent in s 39B(1) of the *Judiciary Act*. The scope and grounds of constitutional judicial review can only be understood in the context of the remedies which define the jurisdiction in s 75(v) of the *Constitution* and s 39B(1) of the *Judiciary Act*.

## Source

3.5 Section 75(v) of the *Constitution* confers on the High Court original jurisdiction in all matters ‘in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth’.<sup>146</sup> Section 75(v) uses the language of the ‘prerogative writs’ that were inherent in the jurisdiction of all superior courts of record, but, as Professor Peter Cane and Associate Professor Leighton McDonald explain, ‘the High Court has rebadged the s 75(v) remedies by replacing the language of “prerogative writs” with that of the “constitutional writs” and “constitutional injunction”’.<sup>147</sup> As this jurisdiction is in the *Constitution*, it cannot be excluded by legislation.

3.6 Section 39B(1) of the *Judiciary Act* confers on the Federal Court an equivalent jurisdiction to s 75(v). Section 39B(1A) also confers broad additional jurisdiction on the Federal Court in any matter:<sup>148</sup>

- (a) in which the Commonwealth is seeking an injunction or a declaration; or
- (b) arising under the *Constitution*, or involving its interpretation; or
- (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

3.7 Section 44 of the *Judiciary Act* allows the High Court to remit matters to the Federal Court, where the Federal Court has jurisdiction with respect to the subject matter and the parties. In most cases, s 75(v) matters can be remitted to the Federal Court;<sup>149</sup> ss 39B(1) and (1A) also allow applications for judicial review to be lodged directly in the Federal Court.

## Scope

3.8 The scope of constitutional judicial review is related to the identity of the decision maker who must be ‘an officer of the Commonwealth’,<sup>150</sup> which includes: public servants;<sup>151</sup> Ministers<sup>152</sup> and their delegates; and federal judges<sup>153</sup> (though not High Court judges).<sup>154</sup> It

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<sup>146</sup> Mandamus—a writ compelling the exercise of a public power in accordance with a duty; prohibition—an order preventing particular conduct; injunction—an order restraining particular conduct.

<sup>147</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 70.

<sup>148</sup> Section 2 of the *Judiciary Act* defines ‘matter’ to include ‘any proceeding in a Court, whether between parties or not, and also any incidental proceeding in a cause or matter’ and defines ‘cause’ to include ‘any suit, and also includes criminal proceedings’.

<sup>149</sup> Section 44 allows the High Court to remit any matter that is pending in the High Court to any federal court or court of any State or Territory that has jurisdiction in the matters. Therefore in matters where the Federal Court does not have jurisdiction, for example in relation to most decisions under the *Migration Act 1958* (s 476A) the High Court cannot remit those matters to the Federal Court. *Australian Constitution*, s 75(v).

<sup>151</sup> *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Limited* [No 1] (1914) 18 CLR 54, 66; *Church of Scientology v Woodward* (1982) 154 CLR 25, 65.

<sup>152</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25, 65.

<sup>153</sup> *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Company Limited* [No 1] (1914) 18 CLR 54, 66; *Church of Scientology v Woodward* (1982) 154 CLR 25.

<sup>154</sup> *Re Carmody; Ex parte Glennan* (2003) 198 ALR 259, [6].

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does not include a State court or judge exercising federal jurisdiction.<sup>155</sup> The scope of review is also related to the availability of the constitutional remedies, discussed in more detail below. More significantly, as noted by Stephen Gageler SC:

judicial review of administrative action has come to be seen to be anchored not in the developing common law but in the fairly rigid Australian constitutional structure: its existence mandated and its scope constrained by the separation of judicial power.<sup>156</sup>

3.9 As discussed in Chapter 2, judicial review is generally concerned with the lawfulness of an administrative decision. Gageler has observed that the source of judicial review of both legislation and administrative action ‘can legitimately be labelled “the rule of law” [but] is more precisely identified as the constitutional separation of judicial power from legislative and executive power’.<sup>157</sup> Essentially, as explained by Cane and McDonald, the separation of powers is based on the idea ‘that power should not become too concentrated in the hands of any one branch of government; and ‘that those who exercise power should be subject to some form of external check’.<sup>158</sup>

3.10 Cane and McDonald identified that the traditional role of administrative law in maintaining the separation of powers ‘is primarily concerned with providing an external check on the exercise of power by the executive branch of government’.<sup>159</sup> This external check is solely of the legality of exercises of executive power. Gageler explained that ‘it is the province and duty of the judicial power to declare and enforce the law that constrains and limits the powers of other branches of government’, and this function ‘is not only exclusively the function of the judicial power. It is the sole function of the judicial power’.<sup>160</sup> In *Attorney-General (NSW) v Quin*, Brennan J stated that:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error ... [T]he merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone ... The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise.<sup>161</sup>

<sup>155</sup> *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437. See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 36–39.

<sup>156</sup> See Stephen Gageler, ‘Impact of migration law on the development of Australian administrative law’ (2010) 17 *Australian Journal of Administrative Law* 92, 104.

<sup>157</sup> Stephen Gageler, ‘The underpinnings of judicial review of administrative action: Common law or Constitution?’ (2000) 28 *Federal Law Review* 303, 309.

<sup>158</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 2.

<sup>159</sup> *Ibid.*

<sup>160</sup> Stephen Gageler, ‘The underpinnings of judicial review of administrative action: Common law or Constitution?’ (2000) 28 *Federal Law Review* 303, 309.

<sup>161</sup> (1990) 170 CLR 1, 35–36 (Brennan J).



3.11 The separation of powers therefore becomes the basis for the distinction between ‘legality’ and ‘merits’ in judicial review matters, and the reason why judicial review looks only at the legality of the decision.<sup>162</sup> The distinction is significant because it limits the power of the courts to supervise executive action, ensuring that the courts do not usurp the proper role of the executive. It is also possible that the wide availability of merits review by a specialist tribunal—the Administrative Appeals Tribunal (AAT)—has contributed to the emphasis on the importance of the legality/merits distinction in Australia.

3.12 Gageler pointed out that ‘there is in Australian legal theory a bright line between judicial review and merits review’,<sup>163</sup> but that while in principle the distinction is easy to make, ‘the practice is somewhat blurred’.<sup>164</sup> For example in relation to the application of particular principles of judicial review such as ‘unreasonableness’, the application of legal limits may appear to require some assessment of the merits of a decision. The content of ‘legality’ in particular cases is usually defined by reference to the statutory grant of power from which, in most cases, executive authority to make decisions affecting individuals, derives:

While the legitimate scope of judicial review of administrative action in Australia is fixed its content is ultimately determinable by the legislature in formulating the law, which sets the limits and governs the exercise of the administrator’s powers.<sup>165</sup>

3.13 Thus, the legislature plays a significant role in defining the content of legality in a particular case within the limits on legislative power set by the *Constitution*. Judicial review under s 75(v) is about ‘keeping administrative decision makers within the express or implied limits of the power conferred on them by statute’.<sup>166</sup>

## Remedies

3.14 Section 75(v) of the *Constitution* gives the High Court jurisdiction in any matter in which a person is seeking mandamus, prohibition or an injunction against an officer of the Commonwealth. Certiorari is available as an ancillary remedy where it is necessary for one of these constitutional writs to operate.<sup>167</sup> The court also has an inherent power to grant declarations.<sup>168</sup>

3.15 A writ of prohibition is a discretionary remedy that is available to prevent a court or tribunal from acting in excess of its jurisdiction. A writ of mandamus orders a person to perform a public duty. A writ of certiorari quashes a decision, or deprives the decision of

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<sup>162</sup> Sir Anthony Mason has suggested that such an approach reflects ‘the limited Australian conception of the content of judicial power’ that may be traced to the influence of Dixon CJ: Sir Anthony Mason, ‘Procedural Fairness: Its Development and Continuing Role of the Legitimate Expectation’ (2005) 12 *Australian Journal of Administrative Law* 103, 109.

<sup>163</sup> Stephen Gageler, ‘The Legitimate Scope of Judicial Review’ (2001) 21 *Australian Bar Review* 279, 279.

<sup>164</sup> Ibid 280.

<sup>165</sup> Ibid 281.

<sup>166</sup> Stephen Gageler, ‘Impact of migration law on the development of Australian administrative law’ (2010) 17 *Australian Journal of Administrative Law* 92, 104.

<sup>167</sup> *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673.

<sup>168</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 581–82.

legal effect. Declarations and injunctions are equitable remedies. An injunction may either restrain action or, less commonly, require that action be taken; it may be prescriptive or proscriptive in operation. A declaration is a statement by the court of existing rights or obligations as at law. The court may declare that a decision is invalid, that a proposed decision would be invalid, or that a particular action or duty should be performed—it is not a coercive remedy.

3.16 At common law, to obtain the writs of prohibition and mandamus it was necessary to show ‘jurisdictional error’. The same rule applies to the constitutional writs—which are only available where the decision maker has made a jurisdictional error or has failed to exercise jurisdiction when required to do so by law.<sup>169</sup> The concept of ‘jurisdictional error’ is discussed in more detail below. At common law, certiorari is available for a jurisdictional error or for an ‘error on the face of the record’.<sup>170</sup> However, as noted by a number of Justices in *Re McBain; Ex parte Australian Catholic Bishops Conference*, in the constitutional jurisdiction certiorari is only available for an error on the face of the record where the error is also a jurisdictional error. This is because certiorari is only available as an ancillary remedy, and the remedies to which it is ancillary are only available for a jurisdictional error.<sup>171</sup> In its 2010 decision in *Kirk v Industrial Court (NSW) (Kirk)*,<sup>172</sup> the High Court held that what constitutes ‘the record’ for these purposes now includes the reasons for judgment of an inferior court.

3.17 In 2003 the High Court commented in obiter that injunctive relief may be available for a wider range of grounds than the constitutional writs, including for non-jurisdictional errors.<sup>173</sup> Cane and McDonald suggest that this may mean an injunction can be obtained under s 75(v) for a non-jurisdictional error, but only to have prospective operation.<sup>174</sup>

## Jurisdictional error

3.18 Hayne J explained in *Re Refugee Review Tribunal; Ex parte Aala* that ‘there is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do’.<sup>175</sup> In the United Kingdom and New Zealand the distinction between jurisdictional and non-jurisdictional errors has been rejected.<sup>176</sup> Chief Justice Spigelman of the New South Wales Supreme Court argued that ‘the distinction is necessitated in Australian law by our separation of powers doctrine’.<sup>177</sup> As Gageler pointed out, the term has become increasingly significant in Australia due to the High Court’s identification of jurisdictional error as the

<sup>169</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508.

<sup>170</sup> An error ‘on the face of the record’ is an error that is identifiable from the written record of the decision.

<sup>171</sup> (2002) 209 CLR 372, 393–4 (Gleeson CJ) 403 (Gummow and Gaudron JJ) 440–1 (Kirby J). See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90–91 (Gaudron and Gummow JJ).

<sup>172</sup> (2010) 239 CLR 531, 577–78.

<sup>173</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508.

<sup>174</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 114.

<sup>175</sup> (2000) 204 CLR 82, 141

<sup>176</sup> *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Lord President of the Privy Council, Ex parte Page* [1993] AC 682.

<sup>177</sup> James Spigelman, ‘The centrality of jurisdictional error’ (2010) 21 *Public Law Review* 77, 83.

unifying principle upon which constitutional judicial review is based.<sup>178</sup> In *Minister for Immigration and Citizenship v SZMDS*, Gummow ACJ and Kiefel J suggested that jurisdictional error does not play the same central role in identification of legal error in ‘systems of review of administrative decisions which are established by laws of the Commonwealth and under which the grounds of review are not limited to those involving jurisdictional error’.<sup>179</sup> Gummow ACJ and Kiefel J pointed to the availability of review under the *ADJR Act* on the grounds ‘that the decision “involved an error of law” (s 5(1)(f)) and that there was no evidence or other material to justify the decision (s 5(1)(h) and (3))’.<sup>180</sup>

3.19 The High Court has linked the concept of jurisdictional error to the separation of powers in the *Constitution*.<sup>181</sup> As Gageler explains, this has ‘anchored’ judicial review in the constitutional structure, ‘its existence mandated and its scope constrained by the separation of judicial power’.<sup>182</sup> Thus, in the constitutional context, the concept of jurisdictional error is linked to the broader principle of legality, discussed above.

3.20 The significance of review for jurisdictional error under s 75(v) emerged in 2001 in a High Court challenge to the *Migration Act 1958* (Cth) (*Migration Act*), s 474 of which purported to exclude decisions made under the *Migration Act* from judicial review by any court (a ‘privative clause’).<sup>183</sup> In *Plaintiff S157 v Commonwealth* (*Plaintiff S157*), the High Court held that the clause did not apply to decisions affected by jurisdictional error, because those decisions were not made ‘under the Act’.<sup>184</sup> Hence, the power of the High Court to grant judicial review remedies for jurisdictional errors was not excluded by s 474. The High Court stated that s 75(v) ‘introduces into the *Constitution* of the Commonwealth an entrenched minimum provision of judicial review’.<sup>185</sup> The Australian Parliament could not, therefore, restrict judicial review for jurisdictional error through the use of privative clauses.

3.21 In 2010, the High Court in *Kirk* considered the position of State courts in the Australian constitutional system, and held that State parliaments similarly could not restrict the power of State Supreme Courts to review administrative decisions on the basis of jurisdictional error.<sup>186</sup> As explained by Spigelman CJ:

The effect of *Kirk* is that there is, by force of s 73, an ‘entrenched minimum provision of judicial review’ applicable to State decision makers of a similar, probably the same, character as the High Court determined in *Plaintiff S157/2002 v Commonwealth* ... to exist in the case of Commonwealth decision makers by force of s 75(v) of the *Constitution*.<sup>187</sup>

<sup>178</sup> Stephen Gageler, ‘Impact of migration law on the development of Australian administrative law’ (2010) 17 *Australian Journal of Administrative Law* 92, 93.

<sup>179</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 616 (Gummow ACJ and Kiefel J).

<sup>180</sup> *Ibid.*

<sup>181</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 23–24.

<sup>182</sup> Stephen Gageler, ‘Impact of migration law on the development of Australian administrative law’ (2010) 17 *Australian Journal of Administrative Law* 92, 104.

<sup>183</sup> A privative clause is a clause which purports to exclude the availability of judicial review.

<sup>184</sup> *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 506.

<sup>185</sup> *Ibid.* 513.

<sup>186</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

<sup>187</sup> James Spigelman, ‘The centrality of jurisdictional error’ (2010) 21 *Public Law Review* 77, 81.

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3.22 How can jurisdictional error be defined? In *Craig v South Australia (Craig)*,<sup>188</sup> the High Court drew a distinction between the extent of jurisdictional error in the context of an inferior court—which has power authoritatively to determine questions of fact and law—and administrative decision makers. This distinction was confirmed by the High Court in *Kirk*.<sup>189</sup> In *Craig*, the High Court stated that an inferior court would fall into jurisdictional error if it ‘mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist’.<sup>190</sup> The court stated that this includes:

- entertaining a matter that lies outside the limits of the court’s powers;
- acting in the absence of a jurisdictional fact;<sup>191</sup>
- failing to consider a matter that the relevant statute requires to be taken into account as a condition of jurisdiction, or considering an irrelevant matter; and
- misconstruing the relevant statute in a way that leads to the decision maker misconceiving the extent of its powers.<sup>192</sup>

3.23 Following *Plaintiff S157*, the statement by Brennan J in *Kioa v West* regarding the implication of procedural fairness from the statutory context has become increasingly significant:

At base, the jurisdiction of a court judicially to review a decision made in the exercise of a statutory power on the ground that the decision-maker has not observed the principles of natural justice depends upon the legislature’s intention that observance of the principles of natural justice is a condition of the valid exercise of the power ... The statute is construed, as all statutes are construed, against a background of common law notions of justice and fairness and, when the statute does not expressly require that the principles of natural justice be observed, the court construes the statute on the footing that ‘the justice of the common law will supply the omission of the legislature’: *Cooper v Wandsworth Board of Works* ((1863) 14 CB NS 180, 194). The true intention of the legislature is thus ascertained. When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention.<sup>193</sup>

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<sup>188</sup> (1995) 184 CLR 163.

<sup>189</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

<sup>190</sup> *Craig v South Australia* (1995) 184 CLR 163, 177.

<sup>191</sup> A jurisdictional fact is a factual or legal precondition which must be fulfilled before a power can be exercised under a statute. For example, a statute might grant an executive power to grant a licence if the relevant fee has been paid. The payment of the fee is a jurisdictional fact. In *Parisiene Basket Shoes v Whyte* (1938) 59 CLR 369 the High Court held that an inferior court had jurisdiction to determine, rightly or wrongly, any jurisdictional fact—and was not subject to administrative law review for a wrong decision in that regard. However, the bright line distinction between inferior courts and administrative bodies in respect of jurisdictional facts is now less clear—see *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* [2012] HCA 25.

<sup>192</sup> *Craig v South Australia* (1995) 184 CLR 163, 177–78.

<sup>193</sup> *Kioa v West* 159 CLR 550, 609.

3.24 Thus, in *Re Refugee Review Tribunal; Ex parte Aala* the High Court concluded that a failure to afford procedural fairness may result in a jurisdictional error in respect of which the High Court may issue constitutional writs.<sup>194</sup> Applying Brennan J's approach, in *Project Blue Sky Inc v Australian Broadcasting Authority (Project Blue Sky)*,<sup>195</sup> the High Court held that whether or not an error was jurisdictional was a matter to be determined through a process of statutory interpretation—did the Parliament intend that the failure to comply with the express or implied requirement would result in invalidity? However, the High Court made clear that the scope of jurisdictional error may continue to expand when it stated in *Kirk* that it was 'neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error'.<sup>196</sup>

## Constitutional review and the common law grounds

### *Grounds and jurisdictional error*

3.25 Section 75(v) makes no reference to the grounds of review. The grounds of review are therefore linked to the statutory grant of power, and the question of whether the decision maker has acted outside jurisdiction. According to the High Court:

the authority conferred on the repository of a general power cannot be exercised in conflict with a provision which governs the manner of its exercise; the constraint on the exercise of the power defines the ambit of the power granted. A purported exercise of a power in breach of the provision which governs the manner of its exercise is invalid, since there is no power to support it.<sup>197</sup>

3.26 Thus, as a general proposition, the grounds of judicial review which are available in relation to any decision will depend on the construction of the statute governing the decision maker's power. However, the traditional grounds of review are reflected in the concept of jurisdiction, so that in practice the concept of 'jurisdictional error' still leads to decisions based on the traditional grounds. As Gageler explains:

The legal rules giving rise to the traditional grounds of judicial review are ... not discrete or freestanding. They are all aspects of jurisdiction. They serve to identify the scope of a decision maker's power and the conditions of its valid exercise. But ultimately it is for the legislature to set the limits of any jurisdiction it confers. The scope of a decision maker's power and the conditions of its valid exercise can always be defined differently.<sup>198</sup>

An issue that has not been further explored by the High Court is the implication of the observation in the joint judgment in *Plaintiff S157/2002 v Commonwealth*<sup>199</sup> that s 75(v)

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<sup>194</sup> *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

<sup>195</sup> (1998) 194 CLR 355.

<sup>196</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>197</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>198</sup> Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 287.

<sup>199</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. See R Creyke & J McMillan, *Control of Government Action: Text, Cases & Commentary* (3rd ed, 2012) at 5.3.53 – 5.3.56.

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‘introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review’.

3.27 In practice, as Gageler contends, the traditional grounds play a significant role in constitutional judicial review because they amount to the ‘default position’ in the absence of a contrary legislative definition.<sup>200</sup>

#### *Common law grounds*

3.28 As Emeritus Professor Mark Aronson, Bruce Dyer and Associate Professor Matthew Groves explain, ‘the overall ground of judicial review is that the repository of public power has breached the limits placed upon the grant of that power’.<sup>201</sup> The grounds of judicial review, according to Cane and McDonald, ‘flesh out this basic principle’ of legality.<sup>202</sup> The grounds of review are a shorthand description of a number of ways in which an officer of the Commonwealth may breach a grant of power. They include:

- failing to comply with the legislation;
- acting irrationally or unreasonably; and
- failing to follow proper procedures.<sup>203</sup>

3.29 A decision maker may fail to comply with legislative requirements in a number of ways—for example: making an error of law; misinterpreting the statute conferring decision-making power; and acting without jurisdiction.

3.30 A further ground, referred to as ‘*Wednesbury* unreasonableness’, derives from the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.<sup>204</sup> A decision that is ‘so unreasonable that no reasonable authority could ever have come to it’,<sup>205</sup> is an example of a ground of review that developed as a safety net to catch cases not demonstrating error on one of the more specific grounds of judicial review falling within this category.<sup>206</sup> In the UK, *Wednesbury* unreasonableness developed in the 1990s to mean that, as explained by Michael Taggart, the graver the impact of the decision on the affected person, the more substantial the justification that will be required to uphold it.<sup>207</sup> However, these developments toward

<sup>200</sup> Stephen Gageler, ‘The Legitimate Scope of Judicial Review’ (2001) 21 *Australian Bar Review* 279, 287.

<sup>201</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 93.

<sup>202</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 123.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (Lord Greene).

<sup>205</sup> *Ibid.*

<sup>206</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 180. Mark Aronson considers that a finding of *Wednesbury* unreasonableness is not a finding of irrationality or legal error *per se*, but rather evidence ‘that the decision-maker might well have misunderstood the relevant law or overlooked a critical and required criterion’: Mark Aronson, ‘Unreasonableness and Error of Law’ (2001) 24 *University of New South Wales Law Journal* 315, 320.

<sup>207</sup> Michael Taggart, ‘Australian “Exceptionalism” in Judicial Review’ (2008) 36 *Federal Law Review* 1, 12.



‘variable intensity unreasonableness review’ have not been accepted by the Federal Court, because it may involve consideration of the merits of the decision.<sup>208</sup>

3.31 Closely related to *Wednesbury* unreasonableness, irrationality or illogicality in the reasoning for an administrative decision has been accepted as a common law ground of review in Australia, at least for jurisdictional facts.<sup>209</sup> The critical question is whether the determination was ‘irrational, illogical and not based on findings or inferences of fact supported by logical grounds’.<sup>210</sup>

3.32 Decision makers can also breach the limits of a grant of power by failing to follow proper procedures when making a decision—failing to apply the rules of ‘natural justice’ or ‘procedural fairness’.<sup>211</sup> Relevant requirements include: providing a person affected by the decision with notice; providing them the opportunity to be heard and respond to the case; and the impartiality of the decision maker. Natural justice is more often described as ‘procedural fairness’ in the Australian administrative law context.<sup>212</sup> Procedural fairness has two limbs—the rule against bias and the fair hearing rule.<sup>213</sup>

3.33 The rule against bias covers both actual and apprehended bias—the decision maker must not only be free from bias but also appear to be free from bias.<sup>214</sup> The right to a fair hearing applies where a person has a legitimate expectation that he or she will be afforded procedural fairness in the making of a decision that affects him or her.<sup>215</sup> The right is subject to any clear contrary statutory intention and the individual’s rights, interest or legitimate expectations must be affected in a direct and immediate way.<sup>216</sup>

3.34 The extent to which judicial review will protect ‘legitimate expectations’ is still the subject of some uncertainty. In *Minister for Immigration and Ethnic Affairs v Teoh* (*Teoh*) the High Court held that the ratification by the Australian Government of an international treaty gave rise to a legitimate expectation that a decision maker would act in conformity with the treaty requirements.<sup>217</sup> If the decision maker decided not to do so, it must inform the person affected and give him or her an opportunity to argue that the decision maker should comply with the treaty.<sup>218</sup> However, in *Minister for Immigration and Indigenous Affairs; Ex parte Lam* (*Lam*),

<sup>208</sup> See *SZADC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1497 (16 December 2003).

<sup>209</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.

<sup>210</sup> Ibid 625 (Gummow ACJ and Kiefel J). The judges then proceeded to find that the RRT decision ‘by reasoning from the circumstances of the visits to the United Kingdom and Pakistan that the first respondent was not to be believed in his account of the life he had led while residing in the UAE was to make a critical finding by inference not supported on logical grounds’: [53].

<sup>211</sup> *Ridge v Baldwin* (1964) AC 40. See recent cases applying the procedural fairness rule in the *Migration Act 1958* judicial review jurisdiction: *Minister for Immigration and Citizenship v Maman* [2012] FCAFC 13 at [30]–[44] per Flick J; *SZQHH v Minister for Immigration and Citizenship* [2012] FCAFC 45.

<sup>212</sup> See eg, *Kioa v West* (1985) 159 CLR 550 at 585 (Mason J) and 601 (Wilson J); and *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 53 (Dawson J).

<sup>213</sup> See eg Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) 369.

<sup>214</sup> Ibid.

<sup>215</sup> *Kioa v West* (1985) 159 CLR 550.

<sup>216</sup> Ibid 584.

<sup>217</sup> 183 CLR 273.

<sup>218</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.



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members of the High Court, in obiter, expressed doubt about the High Court's decision in *Teoh* that the ratification of a treaty by the executive raised a legitimate expectation that that treaty would be taken into account by the decision maker.<sup>219</sup> McHugh and Gummow JJ stated that:

If *Teoh* is to have continued significance at a general level for the principles which inform the relationship between international obligations and the domestic constitutional structure, then further attention will be required to the basis upon which *Teoh* rests.<sup>220</sup>

3.35 In *Lam*, Gleeson J also suggested that there needed to be some 'practical injustice' resulting from the disappointment of a legitimate expectation for the court to issue judicial review remedies.<sup>221</sup> In the 2009 decision in *Minister for Immigration and Citizenship v SZIZO*, the High Court held that breach of a procedural obligation was not a jurisdictional error because no injustice or unfairness resulted from the breach of a 'facilitative provision'—a provision that 'impose[s] obligations which facilitate the conduct of a procedurally fair hearing'.<sup>222</sup> These decisions indicate that, while procedural fairness still focuses on process rather than outcomes, the court will inquire into whether the process was actually unfair rather than applying strict procedural requirements.

3.36 The common law grounds of review are largely codified in the *ADJR Act* ss 5 and 6, considered further below.

## Standing

3.37 A person has standing to apply for judicial review if the court considers that the person has a sufficient connection to the proceedings. Standing is distinct from the merits of the proceeding, and does not necessarily relate to the subject matter of the application. As explained by Mason J, agreeing with Gibbs J, in *Australian Conservation Foundation v Commonwealth*:

a private citizen or a corporation, who has no special interest in the subject matter of the action over and above that enjoyed by the public generally, has no locus standi to seek a declaration or injunction to prevent the violation of a public right or to enforce the performance of a public duty.<sup>223</sup>

3.38 Gibbs J discussed the nature of the interest required for a person to have standing:

A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should

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<sup>219</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>220</sup> *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 32.

<sup>221</sup> *Ibid* 12–13 (Gleeson J).

<sup>222</sup> (2009) 238 CLR 627, 640.

<sup>223</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 547.

be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.<sup>224</sup>

3.39 Therefore, a person will generally have standing to seek any of the constitutional remedies if he or she is adversely affected by executive action in the sense that the person has a special interest in the subject of the decision or would be adversely affected by the outcome.

## **Alternative sources of judicial review**

3.40 There are other sources of judicial review, both in the *Constitution* and the *Judiciary Act*, which can also be used to seek judicial review. In the *Constitution*, s 75(iii) has the widest application, although s 75(i) could also potentially be used. Section 39B(1A)(c) of the *Judiciary Act* is an additional source of review for the Federal Court. These sources, in particular s 39B(1A)(c) of the *Judiciary Act*, do not appear to be as widely used as the more traditional sources in s 75(v) and s 39B(1). This section discusses the availability of review and remedies under these sections.

### *Section 75(iii) of the Constitution*

3.41 Section 75(iii) confers upon the High Court original jurisdiction in all matters ‘in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party’. This section is an alternative means of engaging the High Court’s power to grant remedies, and is not subject to the same restrictions on the grant of remedies as under s 75(v).

3.42 Under s 75(iii) available remedies include the constitutional writs, declaration and certiorari for jurisdictional error and non-jurisdictional error on the face of the record. In *Project Blue Sky* the High Court distinguished between decisions that are invalid because of a jurisdictional error where retrospective remedies would issue, and decisions which are affected by a non-jurisdictional breach of the statute or some other legal requirement where prospective remedies may issue.<sup>225</sup>

3.43 The High Court’s jurisdiction under s 75(iii) is also engaged even where a party is not ‘an officer of the Commonwealth’, as long as the Commonwealth is one of the parties. This may be significant in cases involving government contractors. In *Plaintiff M61 v Commonwealth (Plaintiff M61)* in 2010, the High Court stated that it clearly had jurisdiction over decisions of government contractors because the Court had jurisdiction under ss 75(v), 75(iii) and possibly 75(i).<sup>226</sup> In *Plaintiff M61*, a declaration was granted as a remedy, even though none of the constitutional writs were available.

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<sup>224</sup> *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 530.

<sup>225</sup> (1998) 194 CLR 355, 388–89.

<sup>226</sup> *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 345.

*Section 75(i) of the Constitution*

3.44 Section 75(i) gives the High Court jurisdiction in all matters ‘arising under any treaty’. The potential to use this provision in judicial review applications was recognised by the High Court in *Plaintiff M61*.<sup>227</sup>

*Section 39B(1A)(c) of the Judiciary Act*

3.45 The jurisdiction of the Federal Court to undertake judicial review under s 39B(1A)(c) is very broad and may address many of the restrictions on s 75(v) review. Aronson, Dyer and Groves note that:

Provided that at least part of a matter “arises under” a Commonwealth statute, the Federal Court has judicial review jurisdiction, even though *ADJR* is excluded, and even though no respondent answers s 39B’s description of “officer of the Commonwealth”.<sup>228</sup>

3.46 Remedies under s 39B(1A)(c) are as the Court considers appropriate.<sup>229</sup>

***ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACT 1977***

3.47 The reforms to the judicial review system, implemented by the *ADJR Act*, were intended to overcome many of the technical issues associated with obtaining writs under s 75(v).<sup>230</sup> The *ADJR Act* sought to codify the principles of judicial review and reform relevant procedures, in order to provide a simple alternative to the traditional, complex judicial review processes under the *Constitution*. It also introduced an obligation for decision makers to provide a written statement of reasons on request—an important reform, giving people access to information that could provide evidence to ground a judicial review application. Cane and McDonald suggest that the *ADJR Act* focuses less on the availability of remedies and shifts attention to whether a legal error could be established (a breach of a ground of review).<sup>231</sup>

**Scope**

3.48 The *ADJR Act* provides an automatic right to judicial review of the exercise of a statutory discretion, unless legislation specifically excludes decisions of that kind from *ADJR Act* review. Particular decisions that are exempt from the Act are listed in Schedule 1, in the *Administrative Decisions (Judicial Review) Regulations 1985* and occasionally in the specific legislation under which a decision will be made.

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<sup>227</sup> *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 345.

<sup>228</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 43.

<sup>229</sup> *Federal Court of Australia Act 1976* (Cth) s 23.

<sup>230</sup> Committee of Review of Prerogative Writ Procedure, *Report of the Committee of Review of Prerogative Writ Procedure*, Parl Paper No 56 (1973).

<sup>231</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal regulation of governance* (Oxford University Press, 2009) 53.

3.49 The ADJR Act specifies in s 3 that it applies to all decisions:

of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):

(a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of enactment; or

(b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of enactment;

other than:

(c) a decision by the Governor-General; or

(d) a decision included in any of the classes of decisions set out in Schedule 1.<sup>232</sup>

3.50 Paragraph (b) of the s 3 definition covers State and Territory legislation implementing national schemes, where Commonwealth authorities or officers are given powers under it.

3.51 The phrase ‘administrative character’ is not defined in the *ADJR Act*. The courts have taken a broad view of what is administrative as being that which is neither legislative nor judicial.<sup>233</sup> However, the distinction can be difficult, as Professors Robin Creyke and John McMillan observe, ‘courts have frequently acknowledged the categories overlap and that the characterisation of any function takes colour from the context in which it is exercised’.<sup>234</sup> In *Federal Airports Corporation v Aerolineas Argentinas*, Lehane J stated that ‘general tests frequently provide no clear answer’ and emphasised ‘the need to examine closely the particular provisions and the particular circumstances’.<sup>235</sup>

3.52 The *ADJR Act* applies to decisions and conduct engaged in for the purpose of making a decision.<sup>236</sup> The courts have held that decisions to which the *ADJR Act* applies must be final and operative, and that ‘conduct’ refers to activity preceding a decision that reveals a flawed administrative process (rather than ‘decisions made along the way with a view to making the final determination’).<sup>237</sup> Further cases on the meaning of conduct are few, partly due to the prevailing view that ‘conduct overtaken by a subsequent decision is not independently reviewable but should be considered in the context of the review of the decision itself’.<sup>238</sup>

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<sup>232</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3.

<sup>233</sup> *Griffith University v Tang* (2005) 221 CLR 99, 123. In *ACT Health Authority v Berkeley* (1985) 60 ALR 284, 286; the Federal Court indicated that the word ‘administrative’ is not, in the context of the Act, to be distinguished from ‘executive’.

<sup>234</sup> Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 2<sup>nd</sup> ed, 2009) 109.

<sup>235</sup> (1997) 147 ALR 649, 657 (Beaumont and Whitlam JJ concurring).

<sup>236</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1).

<sup>237</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337–339, 341–342 (Mason CJ).

<sup>238</sup> *Minister for Immigration and Multicultural Affairs v Ozamanian* (1996) 71 FCR 1, 20.

3.53 The *ADJR Act* also requires the decision to be made ‘under an enactment’.<sup>239</sup> This excludes review of non-statutory decisions—for example, those made under executive or prerogative power. It may include an administrative instrument where it is made pursuant to statute.<sup>240</sup> The courts have interpreted the need for a decision to be made ‘under an enactment’ restrictively, requiring a link between the decision to be reviewed and a power conferred by an enactment to make that decision.<sup>241</sup> The test has been expressed in many ways in a number of Federal Court decisions.<sup>242</sup> In *Griffith University v Tang* the High Court held that a decision will only be made ‘under an enactment’, for *ADJR Act* purposes, if it ‘derives from the enactment the capacity to affect legal rights and obligations’<sup>243</sup> or ‘took its legal force or effect from statute’.<sup>244</sup>

## Grounds of review

3.54 A person aggrieved by a decision may apply for judicial review under *ADJR Act* s 5(1) on the following grounds:

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
- (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
- (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
- (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
- (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
- (g) that the decision was induced or affected by fraud;
- (h) that there was no evidence or other material to justify the making of the decision;
- (i) that the decision was otherwise contrary to law.

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<sup>239</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1)(a).

<sup>240</sup> *Ibid* s 3(1); *Chittick v Auckland* (1984) 1 FCR 254.

<sup>241</sup> *Australian National University v Burns* (1982) 42 ALR 25; *Griffith University v Tang* (2005) 221 CLR 99.

<sup>242</sup> *Australian National University v Burns* (1982) 42 ALR 25; *General Newspapers Pty Ltd v Telstra Corporation* (1993) 45 FCR 164; *Salerno v National Crime Authority* (1997) 75 FCR 133.

<sup>243</sup> *Griffith University v Tang* (2005) 221 CLR 99, 128 (Gummow, Callinan and Heydon JJ).

<sup>244</sup> *Ibid* 110 (Gleeson CJ).

3.55 Subsection 5(2) of the *ADJR Act* specifies that the reference to ‘an improper exercise of a power’ in s 5(1)(e) is to be construed as including a reference to:

- (a) taking an irrelevant consideration into account in the exercise of a power;
- (b) failing to take a relevant consideration into account in the exercise of a power;
- (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
- (d) an exercise of a discretionary power in bad faith;
- (e) an exercise of a personal discretionary power at the direction or behest of another person;
- (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
- (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
- (i) any other exercise of a power in a way that constitutes abuse of the power.

3.56 Section 6 of the *ADJR Act* applies similarly to review of conduct relating to the making of decisions.

3.57 Review under the *ADJR Act* extends beyond the requirement in the constitutional judicial review jurisdiction for a jurisdictional error in three respects. First, review under the *ADJR Act* is available for any error of law, whether or not that error is jurisdictional and whether or not the error appears on the face of the record.<sup>245</sup> Secondly, review is available where the decision maker has based the decision on a particular fact, and that fact did not exist—the ‘no evidence’ ground.<sup>246</sup> As explained by Aronson, Dyer and Groves, this ground ‘probably exceeds the common law’s notion of error of law’.<sup>247</sup> Thirdly, review is available where the procedures required by law were not observed.<sup>248</sup> Aronson, Dyer and Groves suggest that this ground appears not to be confined to jurisdictional errors, unlike in the constitutional judicial review jurisdiction.<sup>249</sup>

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<sup>245</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(f).

<sup>246</sup> *Ibid* ss 5(2)(h), (3).

<sup>247</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 187.

<sup>248</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(b).

<sup>249</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 353.

## Standing

3.58 To apply for review under the *ADJR Act* a person must be aggrieved by a decision, conduct or failure to make a decision.<sup>250</sup> In *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport*, Gummow J commented that this was no narrower than standing rules applying for constitutional judicial review.<sup>251</sup>

## Remedies

3.59 One of the main features of the *ADJR Act* is that it removes some of the remedial complexities still associated with constitutional review. The *ADJR Act* structure means that, if an applicant establishes that the court has jurisdiction and there has been some error in the decision making, the court can issue any of the remedies listed in s 16.

3.60 Section 16 confers on the Federal Court and the Federal Magistrates Court wide powers to make orders for substantive relief. Remedies are generally the same as those available for constitutional judicial review, regardless of the court handling the matter, without any restrictions relating to the nature of the error or whether it appears on the record or not. In particular, the court may grant an order:

- quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;
- referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit;
- declaring the rights of the parties in respect of any matter to which the decision relates, or in relation to the making of a decision; or
- directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

3.61 The courts also have power to make orders of such kinds as the court thinks appropriate in relation to matters in which they have jurisdiction, including interlocutory orders and the issue of writs.<sup>252</sup>

## The provision of reasons

3.62 There is no common law obligation upon an administrative decision maker to provide reasons for an adverse administrative decision.<sup>253</sup> However, s 13 of the *ADJR Act*

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<sup>250</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5–7.

<sup>251</sup> *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 71 ALR 73, 81 (Gummow J).

<sup>252</sup> *Federal Court of Australia Act 1976* (Cth) s 23.

<sup>253</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.



provides that, where there is a right of judicial review by the Federal Court and Federal Magistrates Court under the Act, there is also a right to request and obtain from a decision maker a written statement of reasons for a decision. Schedule 2 sets out classes of exclusions from this right.

## OTHER STATUTORY APPEALS

3.63 Some statutory and executive schemes for Commonwealth decision making, particularly those with large volumes of, or special environments for, decisions, have specific statutory appeal or review mechanisms that in many cases replace the need to rely on other general avenues of judicial review.

## Migration

3.64 Part 8 of the *Migration Act* provides a separate scheme for judicial review of migration decisions, which mirrors the constitutional review jurisdiction. Migration decisions are governed by this separate scheme as a result of government policy and court decisions particular to the migration jurisdiction.

3.65 In 1992, in response to significant rises in the number of applications for review of migration decisions in the Federal Court, a separate judicial review scheme was enacted in Part 8 of the *Migration Act* for entry decisions and refugee claims, in substitution for the provisions of *ADJR Act* and the *Judiciary Act*.<sup>254</sup> This constituted a restricted scheme, involving fewer grounds under which review could be sought, mandatory merits review before judicial review could be sought and stricter time limits for applications. However, this led to cases being brought in the original jurisdiction of the High Court, significantly increasing its workload.<sup>255</sup> Over time, the more restrictive scheme in Part 8 was broadened by the courts through statutory interpretation of its provisions.<sup>256</sup>

3.66 Further changes were made to the scheme in 2001, most notably to introduce a 'privative clause' to:

provide decision-makers with wider lawful operation for their decisions such that, provided the decision-maker is acting in good faith, has been given the authority to make the decision concerned ... and does not exceed constitutional limits, the decision will be lawful.<sup>257</sup>

3.67 As noted above, this attempt to limit judicial review was not successful, with the High Court in *Plaintiff S 157* allowing judicial review in relation to decisions that involve

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<sup>254</sup> *Migration Reform Act 1992* (Cth).

<sup>255</sup> Stephen Gageler, 'Impact of migration law on the development of Australian administrative law' (2010) 17 *Australian Journal of Administrative Law* 92, 99.

<sup>256</sup> *Ibid* 98–101.

<sup>257</sup> Explanatory Memorandum, *Migration Legislation Amendment (Judicial Review) Bill 2001* (Cth) [16].

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jurisdictional error.<sup>258</sup> Other amendments in 2001 also introduced a bar on class actions in both the Federal and High Courts, following concerns that such actions were being used to encourage large numbers of people to litigate to prolong their stay in Australia while appealing against adverse visa decisions.<sup>259</sup> Further amendments were made in 2002 to exclude the operation of common law rules in relation to procedural fairness and to codify the procedure for migration decision making.<sup>260</sup>

3.68 In 2005, to ensure that the Federal Magistrates Court would deal with the majority of migration matters involving judicial review, Part 8 of the *Migration Act* was amended to provide that the 'Federal Magistrates Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the *Constitution*' (with some exceptions).<sup>261</sup> The Federal Court still has some first instance jurisdiction over certain migration decisions listed specifically in Part 8.

## Taxation

3.69 The *Taxation Administration Act 1953* (Cth) (*Taxation Administration Act*) provides for several appeal or review processes, depending on the provision under which the decision is made.<sup>262</sup> Under the provisions set out in Part IVC of the *Taxation Administration Act*, a taxpayer who is dissatisfied with a decision by the Commissioner of Taxation has a right to seek review of an assessment and recourse to the Federal Court against a decision on grounds such as that the taxation decision should not have been made or should have been made differently.<sup>263</sup> Following review, the Commissioner has a statutory duty to take whatever action is necessary to give effect to a decision by the AAT or the Federal Court.

3.70 In some cases, review can only be sought under Part IVC of the *Taxation Administration Act*. The *ADJR Act* does not apply to tax assessment decisions,<sup>264</sup> and only applies to a limited number of taxation decisions. Review of some taxation decisions under s 39B of the *Judiciary Act* is restricted through the use of 'no invalidity' clauses—which state that a decision is not invalid because the provisions of the relevant Act have not been complied with. For example, s 175 of the *Income Tax Assessment Act 1936* (Cth) (*Income Tax Assessment Act*) provides that 'the validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with'. In *Commissioner of Taxation v Futuris Corporation*, the High Court held that s 175 had the effect that a breach of the requirements of the *Income Tax Assessment Act* was not a jurisdictional error, and therefore not subject to review under s 39B(1) of the *Judiciary Act* or s 75(v) of the *Constitution*.

<sup>258</sup> *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476. In *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 the High Court held that it was unconstitutional to restrict the time in which an application under s 75(v) could be brought in the High Court. The provision in that case imposed inflexible time limits which did not allow the court to extend to commence proceedings where the court concluded that circumstances might justify such an extension.

<sup>259</sup> *Migration Legislation Amendment Act (No 1) 2001* (Cth).

<sup>260</sup> *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).

<sup>261</sup> *Migration Act 1958* (Cth) s 476.

<sup>262</sup> *Taxation Administration Act 1953* (Cth) part IVC.

<sup>263</sup> *Ibid* s 14ZZO.

<sup>264</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) Schedule 1 paragraphs (e) (f) (ga) (gaa).

## Appeal from the AAT

3.71 Under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*), a party to a merits review proceeding may appeal to the Federal Court on a question of law from any decision of the AAT. The Federal Court rules require that the ‘precise question’ of law be stated.<sup>265</sup> The distinction between questions of law and errors of law is not clear, but there is significant overlap between the two.<sup>266</sup>

3.72 While there is no clear prohibition upon applicants using both s 44 of the *AAT Act* and judicial review under the *ADJR Act* or s 39B of the *Judiciary Act*, it is likely that simultaneous applications of review and appeal might lead the Federal Court to exercise its inherent discretion to stay any judicial review application until an appeal under the *AAT Act* was determined. The Federal Court has held that s 44 is the ordinary basis for appeal of decisions, with applications for judicial review under the *ADJR Act* or *Judiciary Act* generally concerning conduct falling outside the scope of the decision.<sup>267</sup> AAT online information entitled ‘what do I do if I disagree with the Tribunal decision’, points to the ability to appeal under s 44 but not under the *ADJR Act* or the *Judiciary Act*.<sup>268</sup>

## JUDICIAL REVIEW IN THE STATES AND TERRITORIES

3.73 As noted above, State Supreme Courts have inherent power to conduct judicial review. Until recently, judicial review by State Supreme Courts was considered to be of a different nature from federal judicial review by the High Court, based on the common law rather than the *Constitution*. However, in 2010, in *Kirk*, the High Court held that State parliaments could not restrict the power of State Supreme Courts to review administrative decisions on the basis of jurisdictional error.<sup>269</sup> This case may lead to closer alignment between State judicial review and federal judicial review.

3.74 In addition to the inherent jurisdiction of the Supreme Courts, three Australian States, Victoria, Queensland and Tasmania, and the Australian Capital Territory, have introduced statutory judicial review. The judicial review statutes in Queensland,<sup>270</sup> Tasmania<sup>271</sup> and the Australian Capital Territory<sup>272</sup> are modelled on the *ADJR Act*, with some modifications. For example, Queensland’s *Judicial Review Act 1991* applies to a slightly wider

<sup>265</sup> *Federal Court Rules 2011*, r 33.12(2)(b). *Hartnett v Migration Agents Registration Authority* [2004] FCA 50 Marshall J sets out the general principles.

<sup>266</sup> See, eg, Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, Report No 41 (1997). The High Court has also made clear that the scope of a right of appeal on the ground of error of law from a tribunal decision is a limited one that does not grant the court jurisdiction to review the entire matter argued in the tribunal. The appellate jurisdiction covers only as much as is impugned for error of law: *Osland v Secretary to the Department of Justice* (2010) 84 ALJR 528, [20] French CJ, Gummow and Bell JJ [78] (Hayne and Kiefel JJ).

<sup>267</sup> *Osland v Secretary to the Department of Justice* (2010) 84 ALJR 528 [21].

<sup>268</sup> See <www.aat.gov.au>.

<sup>269</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; see also *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* [2012] HCA 25.

<sup>270</sup> *Judicial Review Act 1991* (Qld).

<sup>271</sup> *Judicial Review Act 2000* (Tas).

<sup>272</sup> *Administrative Decisions (Judicial Review) Act 1989* (ACT).

### Chapter 3: Federal Judicial Review in Australia

range of executive action than the *ADJR Act*. In addition to the ‘decision under an enactment’, it also applies to a decision:

a decision of an administrative character made, or proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part)—

- (i) out of amounts appropriated by Parliament; or
- (ii) from a tax, charge, fee or levy authorised by or under an enactment.<sup>273</sup>

3.75 The *Administrative Law Act 1978* (Vic) is significantly different from the *ADJR Act* and other statutory schemes. The *Administrative Law Act* provides for procedures for seeking an ‘order for review’ of a ‘decision of a tribunal’. ‘Tribunal’ is defined as ‘a person or body of persons (not a court or a tribunal constituted of or presided over by a Judge of the Supreme Court)’ required to observe ‘one or more of the rules of natural justice.’<sup>274</sup>

3.76 The Western Australia Law Reform Commission recommended in 2002 that a statutory model similar to that of the *ADJR Act* should be adopted in that State.<sup>275</sup> This recommendation has not yet been implemented.

## JUDICIAL REVIEW STATISTICS

### *ADJR Act* and s 39B of the *Judiciary Act*

3.77 The Federal Court of Australia provided the Council with statistics on numbers of filings and finalisations by subject matter for the financial years 2002–03 to 2010–11 for all applications under the *ADJR Act* and s 39B of the *Judiciary Act* in both the Federal Court and the Federal Magistrates Court. Earlier statistical information on *ADJR Act* filings is available in annual reports. The Court also provided information on the outcomes of matters finalised. These figures do not include applications under Part 8 of the *Migration Act*, or appeals under s 44 of the *AAT Act*, which are discussed separately below.

3.78 In the eight year period covered by these statistics, 457 applications were filed in the Federal Court under the *ADJR Act* and 887 were filed under s 39B of the *Judiciary Act*, including 79 and 475 appeals<sup>276</sup> under the respective Acts. **Figure 1** represents the proportion of initial filings under the *ADJR Act* (total 373) and s 39B (total 397) in each of these financial years. These figures do not take into account applications made in the alternative. The figures show that, with the exception of 2004–05 and 2005–06 (when the Federal Court still had jurisdiction over first instance migration matters), *ADJR Act*

<sup>273</sup> *Judicial Review Act 1991* (Qld) s 4.

<sup>274</sup> *Administrative Law Act 1978* (Vic) s 2.

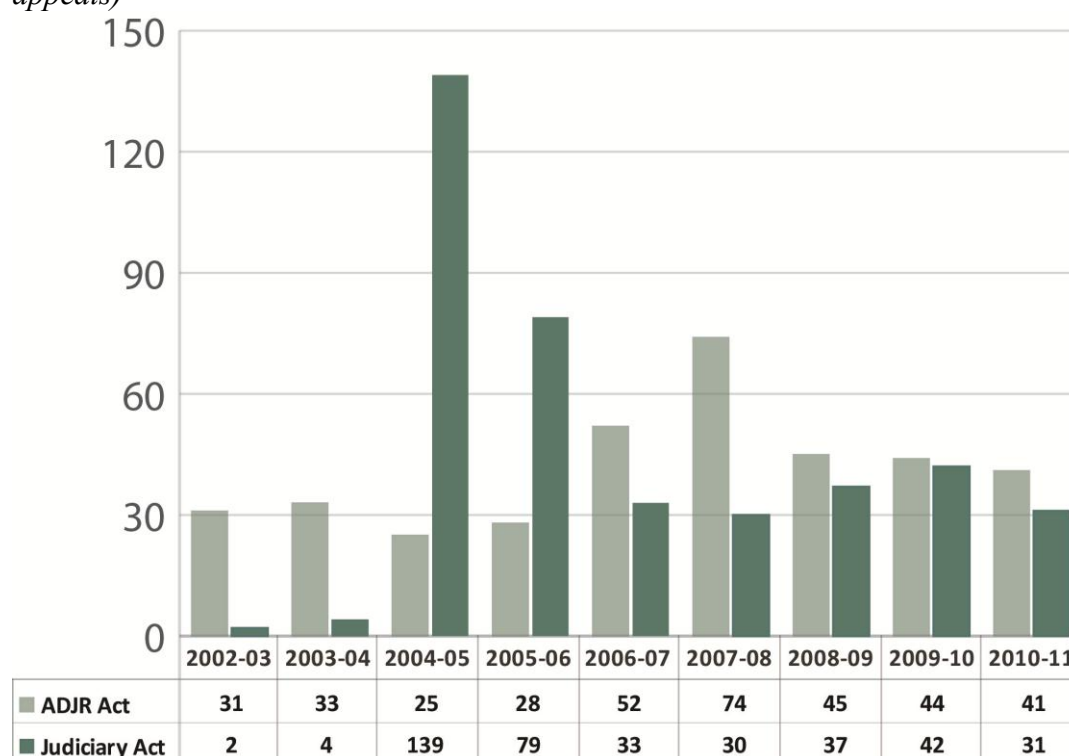
<sup>275</sup> Law Reform Commission of Western Australia, *Report on Judicial Review of Administrative Decisions: Options for Reform*, Project No 95 (2002).

<sup>276</sup> From the Federal Court to the Full Federal Court, and from the Federal Magistrates Court to the Federal Court.

## Federal Judicial Review in Australia

applications exceeded or approximately equalled s 39B applications.<sup>277</sup> These figures show that, despite comments made to the Council during the course of this inquiry, the *ADJR Act* is still utilised by applicants for judicial review in the Federal Court.

**Figure 1:** First instance judicial review filings in the Federal Court of Australia (excluding appeals)

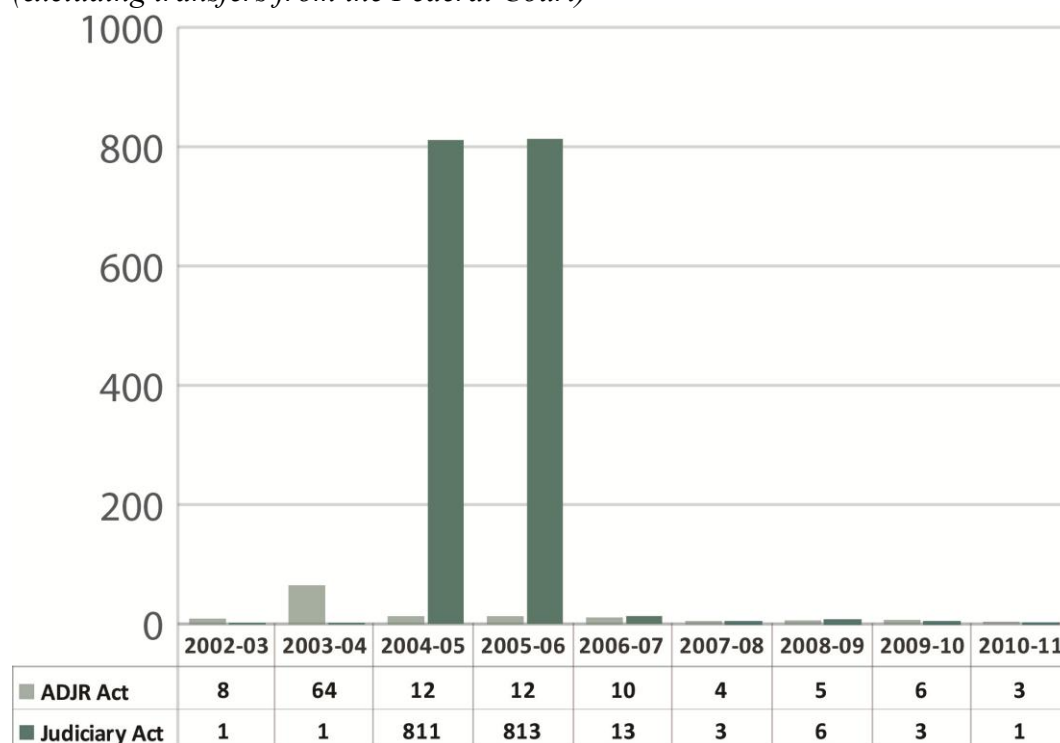


3.79 In the Federal Magistrates Court, in the same period, there were 124 applications filed under the *ADJR Act* and 1,651 filed under s 39B of the *Judiciary Act*. 1,666 of applications filed under s 39B—the vast majority—were in the migration jurisdiction. The Federal Court can remit s 39B matters to the Federal Magistrates Court. Section 39B(1EA) of the *Judiciary Act* gives exclusive jurisdiction to the Federal Magistrates Court in matters where:

- a civil proceeding in relation to which the Attorney-General has given notice under s 5 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* is before the Federal Magistrates Court; and
- ‘a person who is or was a party to the proceeding seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related civil proceeding decision’.

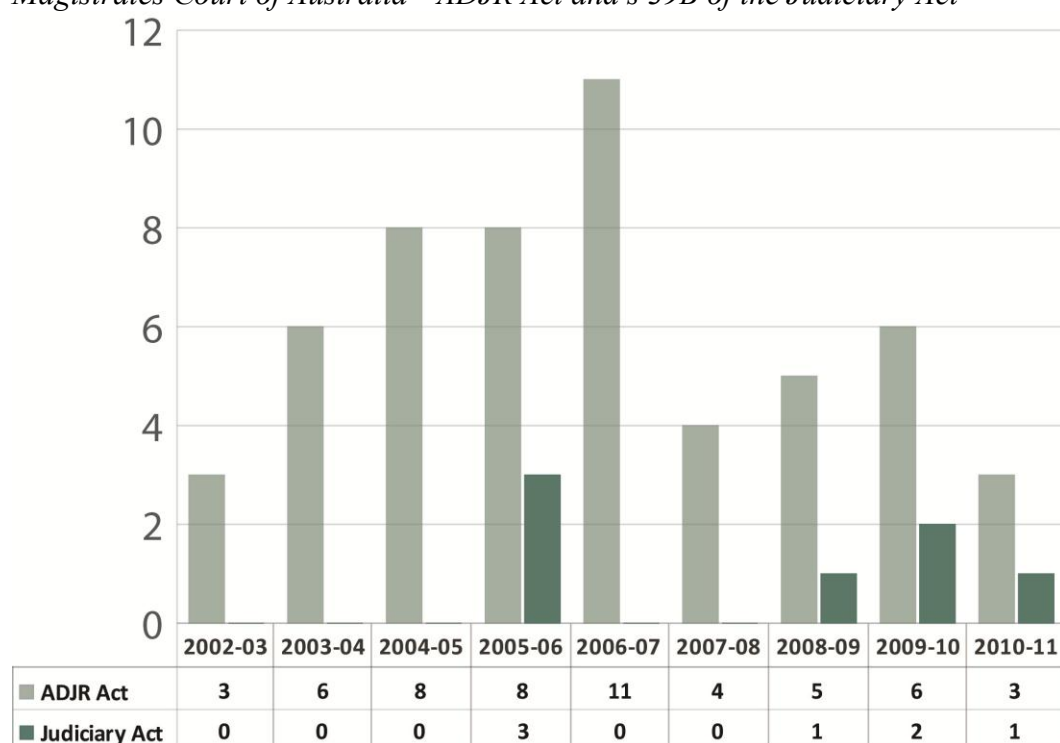
<sup>277</sup> Applications in the alternative are included in the figures only once and categorised, at initiation, as either *ADJR Act* or s 39B as appears most appropriate.

**Figure 2:** First instance judicial review filings in the Federal Magistrates Court of Australia (excluding transfers from the Federal Court)



3.80 As shown in **Figure 2**, the Federal Magistrates Court figures seem heavily skewed because of its central role in the review of migration decisions at that time. The Federal Magistrates Court’s general administrative law workload is relatively low, as shown in **Figure 3**.

**Figure 3:** First instance non-migration related judicial review filings in the Federal Magistrates Court of Australia—ADJR Act and s 39B of the Judiciary Act

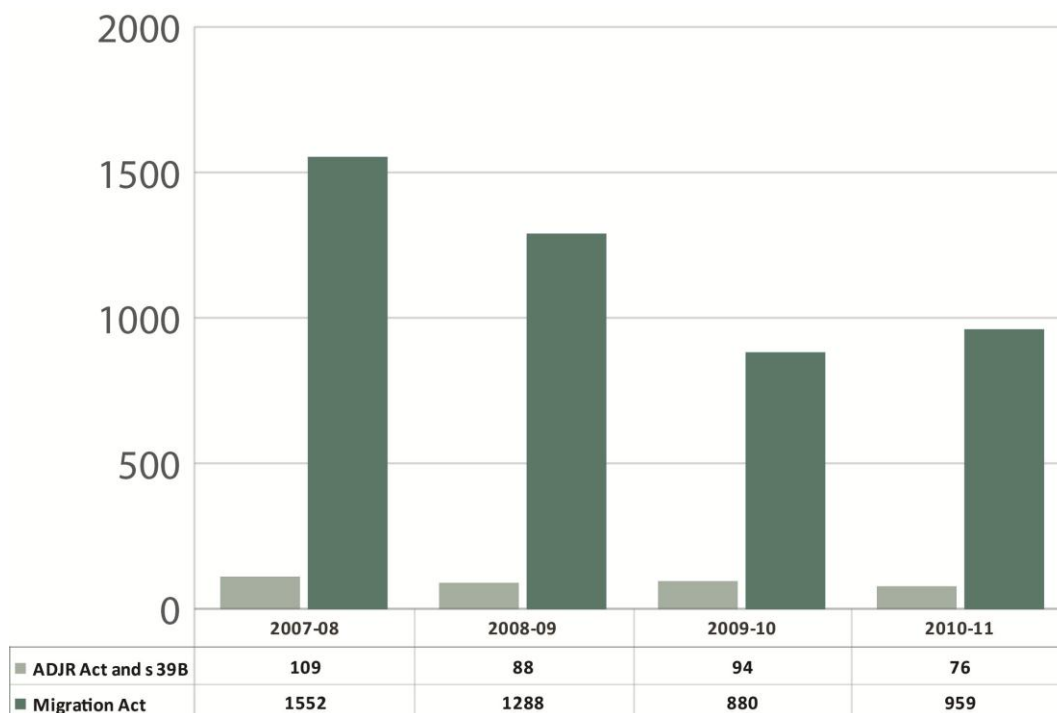


## Other statutory appeals mechanisms

3.81 As discussed above, there are a number of other statutory avenues for review of administrative decision making, apart from s 39B and the *ADJR Act*. The most significant of these are the statutory appeal rights under Part 8 of the *Migration Act* (which grant the Federal Magistrates Court a jurisdiction equivalent to review under s 75(v) of the *Constitution*), Division 5 of the *Taxation Administration Act* and s 44 of the *AAT Act*.

3.82 A large proportion of applications are made under these statutory appeal provisions. In 2010–11, 959 migration matters were filed in the Federal Magistrates Court under Part 8 of the *Migration Act*, and 254 appeals were lodged in the Federal Court. In the past, the number of migration applications lodged in the Federal Court or Federal Magistrates Court has been much higher. For example, in 2003–04, 2,591 migration applications were filed in the Federal Court and 3,031 in the Federal Magistrates Court.

**Figure 4:** *Judicial review applications under Part 8 of the Migration Act in the Federal Magistrates Court of Australia compared to first instance applications under the ADJR Act and s 39B of the Judiciary Act in the Federal Magistrates Court of Australia and Federal Court of Australia (excluding appeals) combined*



3.83 There were 235 taxation matters filed in the Federal Court in 2010–11.<sup>278</sup>

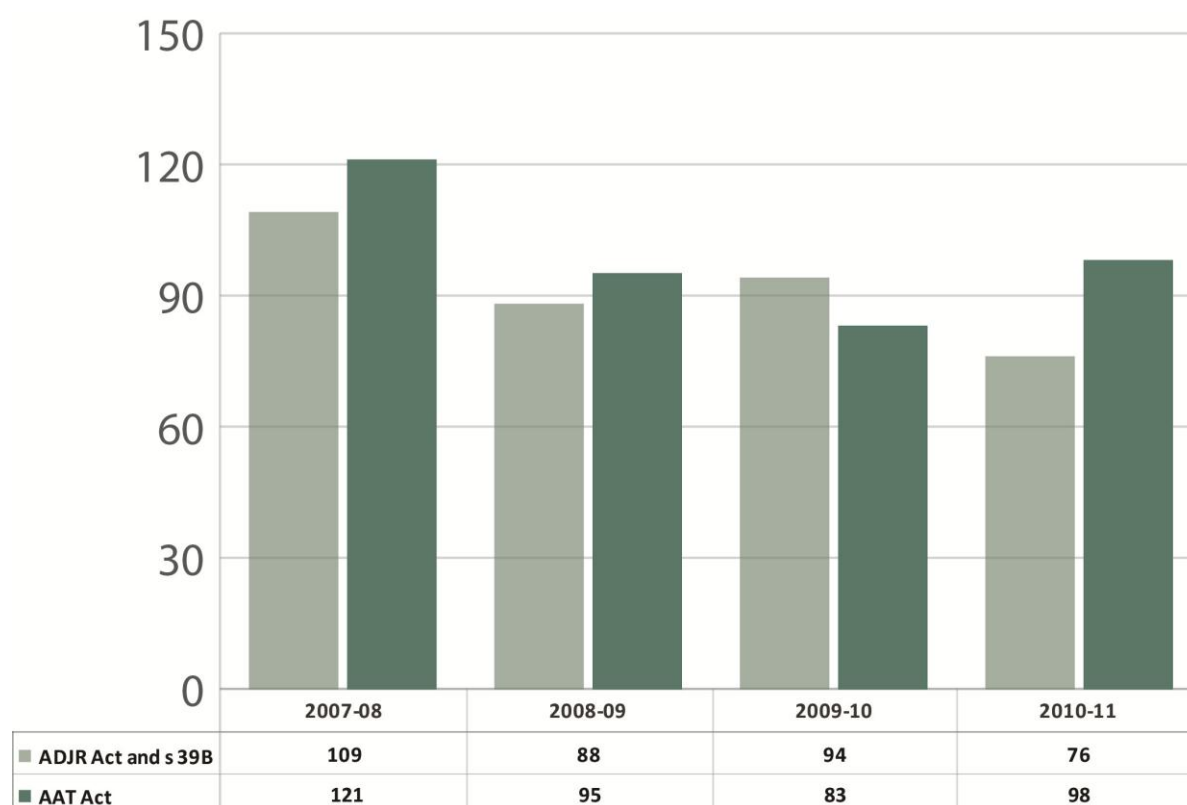
3.84 Appeals on questions of law from the AAT are far more common than judicial review of Tribunal decisions. There were 98 appeals from decisions of the AAT under s 44 of the *AAT Act* in 2010–11 and 23 applications for judicial review under other statutes

<sup>278</sup> Federal Court of Australia, *Annual Report 2010–11* (Commonwealth of Australia, 2011) 143.



(including the *ADJR Act*, s 39B of the *Judiciary Act* and Part 8 of the *Migration Act*).<sup>279</sup> In 2009–10 there were 83 appeals from decisions of the AAT under s 44 of the *AAT Act* and 19 applications for judicial review under other statutes.<sup>280</sup> In 2008–09, there were 95 appeals across all jurisdictions under s 44 of the *AAT Act*, and 15 applications for judicial review under other statutes.<sup>281</sup> In 2007–08, there were 121 appeals on questions of law and 21 applications for judicial review.<sup>282</sup> In 2006–07, there were 127 appeals on questions of law, and seven applications for judicial review.<sup>283</sup> **Figure 5** compares s 44 appeals to other judicial review applications in the Federal Court from 2007–2011.

**Figure 5: Appeals under s 44 of the AAT Act in the Federal Court of Australia and Federal Magistrates Court of Australia compared to judicial review applications under the ADJR Act and s 39B of the Judiciary Act**



3.85 In 2010–2011, 64 statutory appeals against decisions of the Social Security Appeals Tribunal (SSAT) were filed (58 in the Federal Magistrates Court and 6 in the Family Court of Western Australia).

## Other avenues of review

3.86 Disputes and complaints about administrative decision making are usually resolved by means other than judicial review. This includes agency resolution of complaints, merits

<sup>279</sup> Administrative Appeals Tribunal, *Annual Report 2010–11* (Commonwealth of Australia, 2011).

<sup>280</sup> Administrative Appeals Tribunal, *Annual Report 2009–10* (Commonwealth of Australia, 2010).

<sup>281</sup> Administrative Appeals Tribunal, *Annual Report 2008–09* (Commonwealth of Australia, 2009).

<sup>282</sup> Administrative Appeals Tribunal, *Annual Report 2007–08* (Commonwealth of Australia, 2008).

<sup>283</sup> Administrative Appeals Tribunal, *Annual Report 2006–07* (Commonwealth of Australia, 2007).

review and administrative investigation. The figures below show that the proportion of issues that go to judicial review for resolution is small in comparison with other methods of resolution.

3.87 There were 5,437 applications for review lodged with the AAT in 2010–11.<sup>284</sup>

3.88 The Commonwealth Ombudsman received 37,468 approaches and complaints in 2009–10. Of these, 18,313 were about agencies within the Ombudsman’s jurisdiction.<sup>285</sup> The Ombudsman investigated 4,489 separate complaints and identified some agency error or deficiency in 10 per cent of complaints investigated.<sup>286</sup>

3.89 At an agency level, in 2010–11, with 15.6 million tax returns lodged by taxpayers, the Australian Taxation Office internally dealt with 24,225 objections, disputes and reviews.<sup>287</sup> The AAT recorded 1,103 applications lodged for review of taxation decisions and 45 appeals lodged in the Federal Court under s 44 of the *AAT Act*.<sup>288</sup>

3.90 Centrelink granted 3.7 million new claims in 2010–11 and had 7.1 million customers.<sup>289</sup> Of the Centrelink decisions that were challenged in the reporting year, there were:

- 195,277 applications for internal review;
- 11,087 applications to the SSAT;
- 1,975 customer applications to the AAT;<sup>290</sup> and
- 22 Secretary applications to the AAT.<sup>291</sup>

3.91 The AAT recorded 16 appeals from social security decisions under s 44 of the *AAT Act*.<sup>292</sup>

3.92 **Figure 6** gives an overview of the proportion of decisions finalised in the AAT to decisions subject to judicial review.

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<sup>284</sup> Administrative Appeals Tribunal, *Annual Report 2009–10* (Commonwealth of Australia, 2010).

<sup>285</sup> Commonwealth Ombudsman, *Annual Report 2009–2010* (Commonwealth of Australia, 2010).

<sup>286</sup> Ibid.

<sup>287</sup> Australian Taxation Office, *2010–11 Commissioner of Taxation Annual Report* (Commonwealth of Australia, 2011).

<sup>288</sup> Administrative Appeals Tribunal, *Annual Report 2010–11* (Commonwealth of Australia, 2011).

<sup>289</sup> Centrelink, *Annual Report 2009–10* (Commonwealth of Australia, 2010).

<sup>290</sup> These are applications by customers for review of the SSAT’s decisions.

<sup>291</sup> These are applications by the Secretary of Centrelink for review of the SSAT’s decisions.

<sup>292</sup> Administrative Appeals Tribunal, *Annual Report 2010–11* (Commonwealth of Australia, 2011).

**Figure 6:** Applications finalised in the AAT subject to judicial review

Jurisdiction	2010-11		
	Applications finalised	Section 44	Other judicial review
Social Security	1834	16	0
Veterans' affairs	547	14	1
Workers' compensation	1320	18	0
Taxation Appeals Division	1251	14	1
Small Taxation Claims Tribunal	57	0	0
Immigration and citizenship*	369	11	21
Other	59	25	0
<b>Total</b>	<b>5437</b>	<b>98</b>	<b>23</b>

\*Section 44 appeals are not available for certain migration decisions made by the AAT.

## 4. RECOMMENDED MODEL FOR REVIEW

### INTRODUCTION

4.1 The primary issue facing the federal judicial review system is that in practice there are two systems of judicial review. Statutory judicial review occurs under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), and is available in both the Federal Magistrates Court and the Federal Court. Constitutional judicial review is available in the High Court under s 75(v) of the *Australian Constitution*, and in the Federal Court under s 39B(1) of the *Judiciary Act 1903* (Cth) (*Judiciary Act*). Decisions made under the *Migration Act 1958* (Cth) (*Migration Act*) are principally reviewable in the Federal Magistrates Court under provisions of that Act that courts have interpreted as a mirror of the constitutional review jurisdiction. Review of migration decisions is analysed as a separate statutory review scheme in Chapter 6.

4.2 The issue of concern to the Council is the divergence between the two avenues of judicial review available in the Federal Court (review under the *ADJR Act* and review under s 39B(1) of the *Judiciary Act*). This divergence, discussed in Chapter 3, stems from the limited nature of review under the *ADJR Act*, which resulted in litigants electing to commence judicial review proceedings in the High Court under s 75(v) of the *Constitution* in order to circumvent the limitations in the *ADJR Act*. Section 39B(1) extended the jurisdiction of the Federal Court so that applicants could commence constitutional judicial review proceedings in the Federal Court in cases that did not contain issues warranting the consideration of the High Court.

4.3 Since its conferral, the rationale behind the Federal Court's constitutional judicial review jurisdiction has remained relevant, while the nature and frequency of its use has changed significantly. As discussed in Chapter 3, in the period 2007–2011 nearly half the applications for judicial review in the Federal Court were commenced under s 39B(1). In effect, a jurisdiction that was designed to supplement the *ADJR Act* is increasingly overtaking it in importance. Indeed, the view was put to the Council in this inquiry by a number of commentators that the *ADJR Act* procedure is largely irrelevant, or becoming so. Some suggested that the *ADJR Act* be repealed and that federal judicial review be based on the constitutional review jurisdiction.

4.4 The Council's view is that judicial review under the *ADJR Act* should be maintained as the principal avenue for federal judicial review. The beneficial features of the *ADJR Act* include:

- it prescribes a clear, straightforward and self-contained procedure for commencing judicial review proceedings in s 11 of the Act;

## Chapter 4: Recommended Model for Review

- the test for standing to commence proceedings under the Act is defined in ss 3(4), 5 and 6 of the Act, and a third party with an interest in the proceedings can be joined under s 12;
- the Act defines the range of Commonwealth decisions that are reviewable under the Act but also those excluded from review;
- the grounds on which administrative action can be set aside are listed in ss 5, 6 and 7, and provide clear guidance to decision makers as to the legal requirements for lawful decision making;
- the relief that can be granted by a court when a breach of a ground of review is established is set out in s 16, which enables the court to make an order that is appropriate to the case;
- a court can stay the operation of a decision being challenged under ss 15 and 15A; and
- a person may obtain a statement of reasons for a decision under s 13 before commencing judicial review proceedings.

4.5 In the Council's view, the *ADJR Act* has played a central role in improving the quality of Australian Government decision making since 1980 and elevating respect for the rule of law in government. An important body of jurisprudence that lies at the core of Australian administrative law and that is generally understood within government has been developed under the *ADJR Act*. The relative ease with which proceedings can be commenced under the Act means also that judicial review is more accessible to the Australian community and that proceedings can be commenced without professional legal assistance.

4.6 Those benefits are at risk if the current trend continues and constitutional judicial review under s 39B(1) of the *Judiciary Act* becomes the preferred or standard avenue for federal judicial review. The *Judiciary Act* contains few of the features of the *ADJR Act*, such as the procedure for commencing judicial review proceedings, the test for standing, the range of reviewable decisions, the grounds for review, or the right to a statement of reasons. Instead, s 39B(1) states only that a person can apply for a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth. The prevailing view is that relief can be granted (including certiorari or a declaration) if there was a jurisdictional error by an officer of the Commonwealth. A frequent remark by courts and practitioners is that the scope of jurisdictional error cannot readily be defined. Indeed, the concept is more a description of the conclusion reached by a court than a definition of the principles for lawful decision making expected of an officer of the Commonwealth.

4.7 The unavoidable practical reality is that s 39B(1) of the *Judiciary Act* must continue as an avenue for federal judicial review in the Federal Court. If s 39B(1) was repealed, the likely result is that there would be an increase in the number of matters commenced in the original jurisdiction of the High Court, especially if there was doubt as to whether the matter could be commenced in the Federal Court under the *ADJR Act*. This would require the High Court to deal with trial matters that should more appropriately be heard in another court and could

detract from the High Court's appellate role. That outcome would revive the very problems that required enactment of s 39B.

4.8 This presents a difficulty: how can the pre-eminence of the *ADJR Act* in federal judicial review be maintained if the Federal Court also has a jurisdiction to hear proceedings commenced under s 39B(1) of the *Judiciary Act*? Unless some legislative adjustment is made to the Federal Court's jurisdiction, the likely result in the Council's view is that the *ADJR Act* will dwindle in importance and become marginalised. The reasons are twofold.

4.9 Firstly, it is a wise precautionary step for a person commencing judicial review proceedings to do so under s 39B(1), either in addition to *ADJR Act* proceedings or as an alternative. There are fewer apparent limitations on the right to commence proceedings under s 39B(1) than under the *ADJR Act*. Section 39B(1) requires only that the applicant for relief demonstrate an entitlement to an order of mandamus or prohibition or an injunction against an officer of the Commonwealth. The *ADJR Act* requires that proceedings concern a 'decision' or 'conduct' of an 'administrative character' made 'under an enactment',<sup>293</sup> and that the decision not be excluded from review under Schedule 1 of the Act. Stricter time limits also apply to proceedings commenced under the *ADJR Act*.

4.10 Secondly, the large majority of federal judicial review proceedings concern decisions made under the *Migration Act*, where the principles of constitutional judicial review are applied by the High Court, Federal Court and Federal Magistrates Court. Administrative law practitioners who regularly practice in the federal courts are therefore familiar with concepts such as 'matter' and 'jurisdictional error' and the nature of the constitutional remedies, and encounter little inhibition in commencing proceedings under s 39B(1). However, in the view of the Council the framework and principles for federal judicial review must satisfy benefits beyond the convenience of experienced practitioners.

## THE COUNCIL'S PREFERRED MODEL—INCORPORATING CONSTITUTIONAL JUDICIAL REVIEW INTO THE *ADJR ACT*

4.11 The Council sees only two viable options for satisfying the dual objectives of retaining the Federal Court's jurisdiction under s 39B(1), while reinforcing the primacy of the Court's jurisdiction under the *ADJR Act*. The first option is to lessen the present jurisdictional limitations in the *ADJR Act* and allow actions to be commenced that at present can only be commenced under s 39B(1). For example, as recommended by the Council in its report in 1989, the requirement that a decision be made 'under an enactment' could be removed so that the *ADJR Act* applies also to decisions made in the exercise of executive (or non-statutory) power.<sup>294</sup> This may necessitate the revision of some grounds of review in s 5 of the *ADJR Act* that are either explicitly tied to the exercise of statutory power, such as s 5(1)(d) (decision not authorised by the enactment) and s 5(1)(e) (improper exercise of the power conferred by the enactment), or have developed on that assumption, such as s 5(2)(e)

<sup>293</sup> *Administrative Decisions (Judicial Review) Act 1977* s 3.

<sup>294</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 43.

## Chapter 4: Recommended Model for Review

(inflexible application of policy) and s 5(2)(h) (uncertainty). Another approach, supported in some of the submissions to this inquiry, would be to broaden the scope of the *ADJR Act* to extend an exercise of ‘public power’ or the discharge of a ‘public function’.

4.12 The Council does not support this option. The chief difficulty, as explained in Chapter 5 of this report, is that it would replace *ADJR Act* jurisdictional tests that have been interpreted and applied for over 30 years and that have a relatively settled operation, with new tests of uncertain meaning and operation. This change could usher in a new phase of adventurous re-thinking of the scope of judicial review, the grounds of review and the objectives of administrative law. The Council does not believe that the resulting litigation would necessarily enhance adherence to the core values of administrative law, or that Parliament would support such a change.

4.13 The second option is to add a new head of jurisdiction to the *ADJR Act*, based on s 75(v) of the Constitution. This is the Council’s preferred option, and is taken up in Recommendation 1 below. The Council recommends that the *ADJR Act* be amended to provide that a person who is otherwise able to initiate proceedings in the High Court under s 75(v) may apply for an order of review under the *ADJR Act*.

4.14 An action that relied on this head of jurisdiction would be commenced under s 11 of the *ADJR Act*, using the same procedure that applies to other *ADJR Act* proceedings. If a court was satisfied at the conclusion of proceedings that an order of review should be granted, this would be done under s 16 of the *ADJR Act*, rather than by the grant of a constitutional remedy such as mandamus, prohibition or injunction. The constitutional remedies nevertheless have a role to play, as the concept of jurisdictional error that is applied in constitutional judicial review is tied to those remedies. In essence, a court could make an order of review under this extended head of jurisdiction upon being satisfied that a jurisdictional error had occurred. There would be no listed grounds on which relief could be granted, and ss 5, 6 and 7 of the *ADJR Act* would not directly apply to these proceedings.

4.15 Consequential changes would be required to some other provisions of the *ADJR Act*. We do not recommend that the right to obtain a statement of reasons under s 13 should apply to proceedings that rely on this new head of jurisdiction. The statement of reasons procedure is currently tied, at least in practice and in the jurisprudence that accompanies s 13, to decisions that are made under legislation. There may be a case for extending the right to reasons to categories of decisions that presently fall beyond the scope of the *ADJR Act*, but that extension could be considered at a later stage.

4.16 Another change recommended by the Council in other chapters of this report is that the *ADJR Act* (even as extended as recommended in this chapter) should not apply to special categories of decisions, such as criminal justice decisions, decisions made under the executive scheme for Compensation for Detriment caused by Defective Administration (CDDA), and certain vice-regal decisions (see Chapter 5). It would still be open to a person, as at present, to initiate proceedings for review of such a decision under s 75(v) of the *Constitution*. However, this lies at the periphery of constitutional judicial review and would not result in a further marked divergence between the *ADJR Act* and s 75(v). It would also be necessary to



exclude decisions of federal judicial officers; they can be reviewed under s 75(v) but it would not be appropriate that they are reviewable under an *ADJR Act* procedure.

4.17 The Council acknowledges that the model for federal judicial review recommended in this chapter is an unconventional way of creating a jurisdiction in a court to undertake judicial review. However, the Council believes that this is the most suitable way of achieving the dual objective of retaining the Federal Court's jurisdiction under s 39B(1), while reinforcing the primacy of the Court's jurisdiction under the *ADJR Act*.

4.18 The essence of this approach is that no change would be made to the established procedure for judicial review in the Federal Court under either the *ADJR Act* or s 39B(1) of the *Judiciary Act*. There would be no change to the provisions of the *ADJR Act* that enable review of whether a decision of an administrative character made under an enactment complies with the criteria for legality specified in s 5 of the Act. Similarly, an action could still be commenced under s 39B(1) of the *Judiciary Act* for a writ of mandamus or prohibition or an injunction against an officer of the Commonwealth. Equally, it would be open to a person, as at present, to commence a proceeding under s 39B(1) either in addition to or as an alternative to an action under the *ADJR Act*.

4.19 However, the Council expects that reliance on s 39B(1) would be less common. A proceeding akin to that under s 39B(1) could be commenced under the extended jurisdiction in the *ADJR Act*, but in a manner that is procedurally simpler. The proceeding could be commenced under s 11 of the *ADJR Act*, rather than by an application for mandamus, prohibition or an injunction. Relief could be granted by the court under s 16 of the *ADJR Act*, which is a more flexible and expanded remedial framework than the constitutional writs. Other beneficial procedures in the *ADJR Act* (such as the court's power to stay the operation of a decision that is being challenged) would also apply.

4.20 The main source of uncertainty—and potential doctrinal untidiness—in the Council's proposal is that the Federal Court would be applying two bodies of substantive law under the *ADJR Act*. The requirements for lawful decision making include both the grounds of review in ss 5, 6 and 7 of the Act, concerning decisions of an administrative character made under an enactment, and the concept of jurisdictional error, concerning other actions by an officer of the Commonwealth. This already occurs at present, according to whether a proceeding is commenced under the *ADJR Act* or s 39B(1) of the *Judiciary Act*.

4.21 It is possible, on the Council's recommended approach, that courts would pay explicit regard to the criteria in s 5 of the *ADJR Act* in elaborating the concept of jurisdictional error. A closer alignment of statutory judicial review and constitutional judicial review could lead to the development of a more coherent and integrated body of legal principle to guide decision makers on the requirements for lawful decision making. This would also restore the pre-eminence of the *ADJR Act* in providing that administrative law guidance.

**Recommendation 1**

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) should provide that, subject to limited exceptions, a person who otherwise would be able to initiate a proceeding in the High Court under s 75(v) of the *Australian Constitution* may apply for an order of review under the *ADJR Act*. Sections 5, 6, 7 and 13 of the *ADJR Act* would not apply in those proceedings, but other provisions of the *ADJR Act* would apply subject to some modifications.

## 5. AMBIT OF REVIEW

5.1 The model proposed by the Council does not resolve all the outstanding issues as to the ambit of review in Australia. Questions still remain about the scope of constitutional judicial review in some areas, and whether the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) should be specifically amended to extend the ambit of the Act to particular classes of decisions to clarify the law. Since the Council's proposed model would retain s 39B of the *Judiciary Act 1903* (Cth) (*Judiciary Act*), there would still be scope for exemptions from the operation of an amended *ADJR Act*. Accordingly, this chapter considers:

- the current operation of judicial review of non-statutory decisions, preliminary decisions—particularly reports and recommendations—and subordinate legislation; and
- general limitations on review, current exclusions from the *ADJR Act*; and possible exclusions from the Council's recommended model, which are discussed in Chapter 5.

5.2 Many examinations of the extent of statutory review are based on very broad accounts of the types of decisions that are not reviewable—'non-statutory', 'preliminary' or 'legislative' decisions. The Council has taken the approach of looking at more specific examples of the kinds of decisions that fall into these categories, and considering: the kind of accountability mechanisms these decisions are currently subject to; how useful judicial review remedies would be in relation to these decisions; and the extent to which constitutional review currently applies to those decisions, including consideration of whether these decisions have been subject to constitutional judicial review.

### NON-STATUTORY DECISIONS

#### Summary

5.3 The requirement in the *ADJR Act* that a decision be made 'under an enactment'<sup>295</sup> excludes review of non-statutory decisions—decisions not made 'under an enactment'. Executive schemes, schemes to distribute funding which do not have a legislative basis and are an exercise of executive power, have been widely used<sup>296</sup> for purposes such as emergency

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<sup>295</sup> *Administrative Decisions (Judicial Review) Act 1977* s 3.

<sup>296</sup> The decision in *Williams v Commonwealth of Australia* [2012] HCA 23 found such a non-statutory funding scheme to be beyond the executive power of the Commonwealth, casting doubt on the legal basis for similar schemes. Following this judgment, Parliament passed the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth) which provides a legislative basis for such schemes. The Act also amends Schedule 1 of the *ADJR Act* to exempt these schemes from judicial review.

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financial aid, drought relief, health payments, industry incentives and administrative compensation.<sup>297</sup>

5.4 Many submissions to the Council argued that non-statutory schemes should be subject to judicial review under the *ADJR Act*. However, government agencies expressed concern in submissions about the extent of judicial review of non-statutory commercial decisions by government, as discussed below. As the Council has previously discussed, judicial review of tender and contracting decisions has been a particularly contentious area as they lie at the fringe of administrative decision making and may be regarded as falling more readily into the private law areas, with private law remedies arguably more appropriate.<sup>298</sup>

5.5 The precise boundaries of constitutional judicial review of non-statutory decisions are not clearly defined because, unlike statutory decisions, there is not a statutory source to define the limits of decision makers' powers.

5.6 The Council has concluded that these uncertainties are best resolved through the courts defining the application of constitutional judicial review to non-statutory decisions, rather than specific extension of the *ADJR Act* to particular non-statutory decisions.

### Judicial review of non-statutory decisions

5.7 The non-statutory decisions of government fall into three main categories: decisions under executive schemes; commercial decisions of government; and other miscellaneous exercises of executive power under s 61 of the *Australian Constitution*. Different considerations apply to these different types of decision in terms of the possible extension of the *ADJR Act*.

5.8 Overall, it should be noted that the precise application of constitutional judicial review to exercises of non-statutory power remains unclear. As Emeritus Professor Aronson, Bruce Dyer and Associate Professor Matthew Groves explain:

whilst the High Court has not yet ruled on the issue, the indications are that Australia is following the English lead of extending judicial review into the realm of non-statutory executive power. The fact that a power has a non-statutory source no longer guarantees its immunity from judicial review. But that is not to say that all powers formerly immune from judicial review because they were not statutory but executive ... or common law powers are now reviewable.<sup>299</sup>

5.9 It is therefore still unclear how review for jurisdictional error under constitutional judicial review would apply to a decision made in exercise of a power that does not derive from legislation and that may involve a broad discretionary choice. This is discussed in detail

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<sup>297</sup> Professor John McMillan, 'Can administrative law foster good administration' (Speech delivered at The Whitmore Lecture, Sydney, 16 September 2009) <[http://www.ombudsman.gov.au/files/16\\_September\\_2009\\_Can\\_administrative\\_law\\_foster\\_good\\_administration.pdf](http://www.ombudsman.gov.au/files/16_September_2009_Can_administrative_law_foster_good_administration.pdf)>.

<sup>298</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 37.

<sup>299</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 103.

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below with respect to each of the different categories of non-statutory decision. Because the scope of constitutional judicial review in this area is unclear, the Council addresses two questions in relation to the powers discussed:

- whether the *ADJR Act* should specifically allow for review of these decisions in addition to the Council's proposed model; and
- whether any decisions in that category should be excluded explicitly from statutory judicial review.

5.10 The issue is also uncertain following the 2012 decision of the High Court in *Williams v Commonwealth of Australia and Ors*,<sup>300</sup> and the Parliament's response to that decision. The High Court found a non-statutory funding scheme (a school chaplaincy program) to be beyond the executive power of the Commonwealth. Legislation was promptly enacted to provide that the Commonwealth has power to establish a large number of funding arrangements and grants listed in the Act. The statutory description of each arrangement was brief, including only the title of the arrangement and its objective. The legislation further provided that decisions made under those arrangements were not subject to review under the *ADJR Act*.<sup>301</sup> Consequently, there is now a statutory basis or anchor for many executive schemes, but the rules and procedures of the schemes continue to be defined in executive guidelines. Whether this will affect the scope of judicial review of decisions made under these schemes is uncertain.

5.11 Submissions from government expressed concern at extending the *ADJR Act* to cover executive schemes and commercial decisions.<sup>302</sup> Other stakeholders, including academics, public interest groups and the Commonwealth Ombudsman, argued that non-statutory decisions should be subject to review under the *ADJR Act*.<sup>303</sup>

### *Executive power*

5.12 The source of the executive power of the Commonwealth is s 61 of the *Constitution*. In *Barton v Commonwealth of Australia* Mason J stated that:

By s 61 the executive power of the Commonwealth was vested in the Crown. It extends to the execution and maintenance of the *Constitution* and of the laws of the Commonwealth. It enables the Crown to undertake all executive action which is appropriate to the position of the Commonwealth under the *Constitution* and to the spheres of responsibility vested in it by the *Constitution*. It includes the

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<sup>300</sup> [2012] HCA 23.

<sup>301</sup> *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth).

<sup>302</sup> Department of Education, Employment and Workplace Relations, Submission No 3 (24 June 2011); Department of Finance and Deregulation, Submission No 19 (18 July 2011); Department of Agriculture, Fisheries and Forestry, Submission No 16 (1 July 2011); Attorney-General's Department (Cth), Submission No 21 (9 August 2011).

<sup>303</sup> Victoria Legal Aid, Submission No 14 (7 July 2011) 3; Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 3; Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 6–7; Law Council of Australia, Submission No 23 (1 July 2011) [20]; Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 4; Commonwealth Ombudsman, Submission No 15 (8 July 2011) 3.

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prerogative powers of the Crown, that is, the powers accorded to the Crown by the common law.<sup>304</sup>

5.13 The power to ‘execute and maintain’ the *Constitution* extends to the powers to summon, dissolve and prorogue the Parliament (s 5), the issue of writs for elections (ss 5 and 32), the appointment and removal of civil servants (s 67) and the command in chief of the naval and military forces.

5.14 There are varied interpretations regarding the ambit of the ‘prerogative powers of the Crown’ referred to by Mason J. Professor Peter Cane and Associate Professor Leighton McDonald explain that:

There are two basic schools of thought about the nature of ‘prerogative powers’ ... On the broader view, prerogative powers encompass *all* non-statutory powers of the executive arm of the government, including ‘common law’ powers held by legal persons generally (for example, the power to enter into contracts or to conduct non-coercive inquiries). The narrower view is that prerogative powers are those non-statutory powers of the executive arm which are thought to be unique to it ... Important examples of prerogative powers include powers to declare war, enter into treaties, conduct foreign diplomacy, award honours, grant pardons and to appoint judges. On either interpretation, prerogative powers are creations of the common law. As such, they are capable of being modified or abolished by statute.<sup>305</sup>

5.15 The extent to which prerogative powers are subject to judicial review is still uncertain in Australia. Professors Robin Creyke and John McMillan explain that:

while the existence of a claimed prerogative power is always reviewable (*Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75), some prerogative powers will be non-reviewable as to the manner of their exercise, while others are justiciable as a general rule.<sup>306</sup>

5.16 In *Council of Civil Service Unions v Minister for the Civil Service (CSSU)*,<sup>307</sup> the House of Lords held that prerogative powers were not immune from judicial review. *CSSU* concerned a branch of the civil service known as Government Communication Headquarters (GCHQ). GCHQ performed a number of communications functions vital to national security. In 1983, the Minister gave an instruction under Order in Council that the GCHQ staff would no longer be permitted to belong to national trade unions. The Order in Council was created under the prerogative power to regulate home civil service.

5.17 In *CSSU* Lord Diplock stated that he could see ‘no reasons why simply because a decision-making power is derived from a common law and not a statutory source it should *for that reason only* be immune from judicial review’.<sup>308</sup> However, as Lord Roskill observed, the

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<sup>304</sup> (1974) 131 CLR 477, 498.

<sup>305</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 82.

<sup>306</sup> Robin Creyke and John McMillan, *Control of Government Action. Text, Cases and Commentary* (LexisNexis, 2<sup>nd</sup> ed, 2009) 81.

<sup>307</sup> [1985] AC 374.

<sup>308</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.

right of challenge to an exercise of prerogative power ‘must ... depend on the subject matter of the prerogative power which is exercised’.<sup>309</sup> As the decision involved the consideration of national security, the court held that it was not justiciable. As Lord Diplock explained, ‘national security is the responsibility of the executive government; what action is needed to protect its interests is ... a matter on which those on whom the responsibility rests, and not the courts of justice, must have the last word’.<sup>310</sup>

5.18 In *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd (Peko-Wallsend)* the Full Federal Court concluded that *CCSU* should be followed in Australia.<sup>311</sup> Bowen CJ stated that, ‘subject to the exclusion of non-justiciable matters, the courts of this country should now accept responsibility for reviewing the decisions of Ministers or the Governor-General in Council notwithstanding the decision is carried out in pursuance of a power derived not from statute but from the common law or prerogative’.<sup>312</sup>

5.19 *Peko-Wallsend* concerned the decision made by the Federal Cabinet, in the exercise of prerogative powers, to nominate Stage II of Kakadu National Park for UNESCO’s World Heritage listing. *Peko-Wallsend Ltd* held mineral leases over land in Stage II and instituted proceedings claiming that, in making the decision, Cabinet was bound by the principles of natural justice to afford it a hearing but had failed to do so. The Federal Court rejected this claim on the basis that the subject matter lay in the political arena,<sup>313</sup> and was therefore inappropriate for judicial determination. However, the Court maintained that it was no longer possible to exclude judicial review merely because a matter concerned a prerogative decision. Wilcox J identified the ‘critical matter’ for consideration as ‘the nature and effect of the relevant decision’.<sup>314</sup> He concluded that:

[the] case did not relate essentially to the personal circumstances on any individual [and] concerned a substantial area of land which the Government regarded as being of national, indeed international, significance and in relation to which many people had concerns of various types.<sup>315</sup>

5.20 Although the High Court has not ruled on the issue directly, the High Court in *R v Toobey; ex parte Northern Land Council (Toobey)*<sup>316</sup> demonstrated its willingness to review acts or decisions of the Crown, at least when referable to statutory authority. In reaching this decision, the High Court rejected a number of arguments commonly raised for excluding review of prerogative and statutory discretions alike.<sup>317</sup>

5.21 The scope of judicial review of the exercise of executive power is not, therefore, completely settled in Australia. It is clear that judicial review extends to whether a decision

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<sup>309</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418.

<sup>310</sup> *Ibid* 412.

<sup>311</sup> (1987) 75 ALR 218.

<sup>312</sup> *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218, 278.

<sup>313</sup> *Ibid* 218.

<sup>314</sup> *Ibid* 304.

<sup>315</sup> *Ibid* 307.

<sup>316</sup> (1981) 151 CLR 170.

<sup>317</sup> Fiona Wheeler, ‘Judicial Review of Prerogative Powers in Australia: Issues and Prospects’ (1992) 14 *Sydney Law Review* 432, 438.



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maker has the power to make a particular decision—that is, whether the executive power authorises the action taken. Further, it appears likely that the High Court will extend the scope to other grounds of judicial review as long as the decision made pursuant to a prerogative power is of a subject matter suitable for judicial review.<sup>318</sup>

5.22 The Council’s model would leave the development of this area of judicial review to the courts. By giving an applicant standing under the *ADJR Act* where they can show an entitlement to the constitutional remedies, arguments about the scope of constitutional judicial review can occur under the auspices of the *ADJR Act*. Given the range of prerogative powers, it is unnecessary specifically to extend judicial review in these areas. However, certain powers of particular national significance, most appropriately dealt with by the High Court, could be excluded from the revised *ADJR Act*—in particular, decisions relating to war and the defence of the nation.

### *Decisions under executive schemes*

5.23 Many Commonwealth executive schemes fall into two categories: schemes that allow the Government to provide discretionary compensation payments; and schemes that provide government grants.<sup>319</sup> Judicial review is not available under the *ADJR Act* of decisions made under executive schemes, nor is review by the Administrative Appeals Tribunal. The Commonwealth Ombudsman can investigate complaints about the administration of executive schemes. The Ombudsman has described the lack of effective review as a fundamental problem, because ‘decisions made under these schemes are often just as important and can affect people’s rights and interests just as much as decisions made under legislative schemes’.<sup>320</sup>

5.24 In Report No 32, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act* (1989), the Council recommended that the *ADJR Act* should extend to certain non-statutory decisions made by officers of the Commonwealth.<sup>321</sup> The Council recommended that the definition of a decision to which the *ADJR Act* applies should be amended to include a:

decision of an administrative character made, or proposed to be made, by an officer of the Commonwealth under a non-statutory scheme or program the funds for which are authorised by an appropriation made by the Parliament for the purpose of that scheme or program.<sup>322</sup>

5.25 A provision of this type was adopted in the *Judicial Review Act 1991* (Qld). Section 4(b) of that Act enables judicial review of decisions made by public officers or employees under a non-statutory ‘scheme or program’, which are supported by funds

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<sup>318</sup> For a detailed discussion of this point see Fiona Wheeler, ‘Judicial Review of Prerogative Powers in Australia: Issues and Prospects’ (1992) 14 *Sydney Law Review* 432.

<sup>319</sup> Commonwealth Ombudsman, *Executive Schemes*, Report 12/2009 (2009). The report draws on the Office’s examination of complaints about various executive schemes in the past six years.

<sup>320</sup> Ibid.

<sup>321</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 1.

<sup>322</sup> Ibid.

appropriated by Parliament or taxes, charges, fees or levies collected by statute.<sup>323</sup> The few applications that have sought to use the provision to support an application for judicial review suggest that there is uncertainty about what might constitute such a ‘scheme or program’.<sup>324</sup>

5.26 In Report No 32, the Council identified two main reasons why such schemes should be subject to review under the *ADJR Act*. First, executive schemes supported by executive action could, if the Government chose, be supported by legislation, and in many cases equivalent schemes are. The Council was of the view that an ‘accident of birth’—whether the scheme was supported by legislative or statutory power—should not determine whether exercises of power under the scheme should or should not be subject to review.<sup>325</sup> Second, funding for such schemes has usually been provided by an appropriation in legislation by Parliament, ‘giving them the same public interest character as they would have if they were the subject of other legislation enacted in the public interest’.<sup>326</sup>

5.27 The Council’s view was that the link with Parliament—through appropriation of funding, the spending of public money and the parallel with many legislation schemes—distinguished executive schemes from other non-statutory decisions, and therefore justified explicitly providing for *ADJR Act* review of these decisions, in addition to the available constitutional judicial review.<sup>327</sup>

5.28 Associate Professor Matthew Groves suggests that the small number of cases that have used the provision in Queensland—and the lack of clear principles in those cases—indicate that the provision has not amounted to a significant extension to the Queensland version of the *ADJR Act*.<sup>328</sup> Drs Billings and Cassimatis submitted that:

the potential utility of these provisions has not been realised in a number of cases where the provisions have not been raised in judicial review proceedings, in circumstances where one might have expected them to be relied upon by applicants.<sup>329</sup>

5.29 They suggest that while ‘empirical analysis would need to be undertaken to assess why the provisions were not raised ... initial indications suggest that legal advisors have not fully appreciated the potential of these provisions’.<sup>330</sup> The Law Council of Australia, the Public Interest Advocacy Centre (PIAC) and the NSW Young Lawyers all supported review

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<sup>323</sup> Section 4(b) of the *Judicial Review Act 1991* (Qld) was based on the wording suggested by the Administrative Review Council in *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 1.

<sup>324</sup> *Bituminous Products Pty Ltd v General Manager (Road System and Engineering) Dept of Main Roads* [2005] 2 Qd R 344, [24] (Holmes J).

<sup>325</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 38.

<sup>326</sup> *Ibid.*

<sup>327</sup> *Ibid.*

<sup>328</sup> Matthew Groves, ‘Should we follow the gospel of the ADJR Act?’ (2010) 34 *Melbourne University Law Review* 452.

<sup>329</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 4.

<sup>330</sup> *Ibid.*

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of non-statutory decisions based on s 4(b) of the *Judicial Review Act 1991* (Qld), modelled on past recommendations of the Council.<sup>331</sup>

5.30 The Department of Education, Employment and Workplace Relations (DEEWR) noted the difficulties in framing the jurisdiction of a decision maker exercising power under an executive scheme.<sup>332</sup> The Council had also noted this difficulty in Report No 32.<sup>333</sup> The Council considers that the most relevant ground of review in relation to non-statutory schemes would be a failure to afford an applicant procedural fairness. Given the broad ambit of the power to administer executive schemes, many other grounds would not be applicable. This lack of clear jurisdictional limits might make the operation of judicial review in this area less clear.

5.31 What kinds of executive payment schemes would statutory judicial review apply to if extended as previously proposed by the Council? As DEEWR submitted, when making the decision whether ‘to establish an executive scheme in order to address a particular area of policy or program concern’, the availability of a statutory right of review ‘may not be a consideration at all, or be only one of many considerations taken into account by the Australian government’.<sup>334</sup> In other words, government does not implement schemes via the executive power in order to avoid judicial review, but for other reasons—in particular, the flexibility of such schemes arising from the absence of legislation and the promptness with which programs can be commenced. It may be that agencies are concerned that some of this flexibility and promptness will be lost if too much emphasis is placed on judicial review standards for decision making. While the Council noted that many of the non-statutory executive schemes could have been implemented through statute,<sup>335</sup> the executive government may have reasons for not wishing to do so.

5.32 Agencies were particularly concerned about the prospect of judicial review of decisions under the Compensation for Detriment Caused by Defective Administration (CDDA) Scheme. The Department of Finance and Deregulation (Finance) submitted that the scheme:

enables Government portfolio Ministers and authorised officials in FMA Act [*Financial Management and Accountability Act 1997*] departments/agencies to compensate individuals or other bodies who have experienced losses caused by a department’s/an agency’s defective administration ... Under the CDDA Scheme, decisions are made at the discretion of the decision maker and payments are approved on the basis that there is a moral, rather than a legal, obligation to the person or body concerned. Each case is determined on its own merits. The

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<sup>331</sup> Law Council of Australia, Submission No 23 (1 July 2011) [20]; Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 3; Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 6–7.

<sup>332</sup> Department of Education, Employment and Workplace Relations, Submission No 3 (24 June 2011) 1.

<sup>333</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 41–42.

<sup>334</sup> Department of Education, Employment and Workplace Relations, Submission No 3 (24 June 2011) 2–3.

<sup>335</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 41.

principles of procedural fairness are applied to CDDA matters and applicants must be treated equitably.<sup>336</sup>

5.33 Finance goes on to state that it did not support the extension of *ADJR Act* review to decisions made under the CDDA Scheme, on the basis that ‘executive schemes provide the executive with flexibility in dealing with administrative challenges arising from the diversity of its activities’.<sup>337</sup>

5.34 This statement highlights one of the key questions regarding the review of executive schemes—if constitutional judicial review is available in the Federal Court under s 39B of the *Judiciary Act*, what disadvantages would flow from also having the decisions reviewable under the *ADJR Act*? If the Council’s model is adapted, allowing for judicial review under the *ADJR Act* of decisions already reviewable under constitutional judicial review, is there still a need to exempt some decisions from the operation of the amended *ADJR Act*? Applicants would have access to broader grounds and more flexible remedies under the amended *ADJR Act*—should judicial review of some decisions be restricted to the constitutional minimum?

5.35 In the 2009 Report, *Putting things right: Compensating for defective administration*,<sup>338</sup> the Commonwealth Ombudsman considered that there were disadvantages to increasing external review of CDDA decisions, including:

- concerns that if courts were to interpret CDDA criteria ‘more expansively’ than administrative decision makers and be ‘more generous in awarding compensation’ then ‘the cost of the CDDA Scheme to government would be both unpredictable and inflationary’;
- the costs of defending proceedings in a court;
- the possibility that the application of legal standards could ‘blur the current distinction between ‘moral’ and ‘legal’ obligation which is currently central to the CDDA; and
- that the CDDA Scheme would become less flexible if agencies were involved in legal disputes and began to focus more on legal principle.<sup>339</sup>

5.36 The Ombudsman concluded that ‘the survival of the CDDA Scheme probably depends upon it remaining an administrative scheme under which decisions are not routinely subject to court or tribunal review’.<sup>340</sup> The Ombudsman’s Report recommended improvements to the scheme, including ensuring that adequate reasons accompany every decision.<sup>341</sup>

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<sup>336</sup> Department of Finance and Deregulation, Submission No 19 (18 July 2011) 3.

<sup>337</sup> Ibid 4.

<sup>338</sup> Commonwealth Ombudsman, *Putting things right: Compensating for defective administration*, Report No 11 (2009).

<sup>339</sup> Ibid 20.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid (Recommendation 1(h)).

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5.37 In its submission to the Council's current inquiry, the Ombudsman noted its past concerns of 'poor decision making practices as well as the lack of effective review rights for persons dissatisfied by decisions made under executive schemes'.<sup>342</sup> In particular, the Ombudsman referred to its 2009 Executive Schemes report,<sup>343</sup> which raised concerns about the lack of internal guidelines, poor recordkeeping and inadequate reasons given to claimants. In contrast to the position expressed in its 2009 CDDA report, the Ombudsman submitted that these concerns warranted an extension of the *ADJR Act* to CDDA decisions.<sup>344</sup> Victorian Legal Aid also expressed concern with the inconsistency of decisions made under the CDDA Scheme and argued that expanding judicial review under the *ADJR Act* to cover schemes would 'tend to promote consistency in terms of process and principles applied'.<sup>345</sup>

5.38 A number of discretionary compensation schemes which Finance administers are statutory schemes—'act of grace' payments and waivers of debts. The Finance figures indicate that even where review is available under the *ADJR Act* rather than solely under s 39B, the numbers of applications for review of discretionary compensation decisions are not large:

In relation to proceedings under the *ADJR Act* related to discretionary compensation, they have been rare: there have been 13 instances of litigation under the *ADJR Act* since 2001. This represents 0.24% of claims. During that period, Finance has received 5,401 claims for act of grace payments and/or waivers of debt, 99 requests for statements of reasons (1.83% of total claims), and 46 investigations by the Ombudsman (0.85% of total claims).

Of the 13 litigated claims, three are ongoing, one resulted in a decision being set aside and the remainder were either dismissed or discontinued—in no case has a claimant been successful in a subsequent claim for compensation following litigation.<sup>346</sup>

5.39 In at least two cases, applications for review of CDDA decisions were made under the *ADJR Act* and were unsuccessful because the court held they were not decisions 'under an enactment' and therefore that statutory judicial review under the *ADJR Act* was not available.<sup>347</sup> The Council received no submissions containing examples of review of CDDA decisions under s 39B, and could not find any examples of such cases.

5.40 The Council acknowledges the concerns raised by the Ombudsman and Victorian Legal Aid, and agrees that the CDDA scheme involves rules-based decision making which could be amenable to judicial review. While the grounds of review are likely to be limited, grounds such as procedural fairness, not taking into account a relevant consideration and taking into account an irrelevant consideration would still be arguable.

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<sup>342</sup> Commonwealth Ombudsman, Submission No 15, 8 July 2011, 3-4.

<sup>343</sup> Commonwealth Ombudsman, *Executive Schemes*, Report No 12 (2009).

<sup>344</sup> Ibid 4.

<sup>345</sup> Victoria Legal Aid, Submission No 14 (7 July 2011) 3.

<sup>346</sup> Department of Finance and Deregulation, Submission No 19 (18 July 2011) 2.

<sup>347</sup> *Smith v Oakenfull* (2004) 134 FCR 413; *Barron v Commonwealth Department of Health and Ageing* (2003) 176 FLR 192.

5.41 On the other hand, the Council accepts that CDDA payments are at the discretion of the executive, and largely issue as an alternative to legal remedies. The Council also notes that significant improvements have been made to the implementation of the scheme since 2009. Finance Circular 2009/09 contains procedural guidance for decision makers, including strict requirements to provide adequate reasons for decisions.<sup>348</sup>

5.42 On balance, the Council's view is that decisions made under the CDDA Scheme would continue to be reviewable in the Federal Court under s 39B of the *Judiciary Act* but not under the *ADJR Act*. As such, if the Council's preferred model were implemented, CDDA decisions would be excluded from the ambit of the amended *ADJR Act*. The Council bases this recommendation on its expectation that decision making under the CDDA scheme will be undertaken in accordance with the procedures in Finance Circular 2009/09, and that there will be active oversight of CDDA administration by the Commonwealth Ombudsman.

5.43 The other area of concern in relation to executive schemes is in relation to payments by Government, such as grants and emergency payments.

5.44 There are a wide variety of grants processes—some have guidelines and an application process, others may be purely at the discretion of the executive government. Typically grants programs involve the allocation of a limited amount of resources among a number of applicants. Sometimes a large amount of money is distributed. The group being considered for the grants may not be clearly defined if there is no application process.

5.45 National Security Law and Policy Division of the Attorney-General's Department (NSLPD) gave the example of the Building Community Resilience grants programs, and pointed out that these programs are governed by significant legislative and policy frameworks. NSLPD expressed concern at reviewing such a scheme 'where the funding agreements are already in place and expenditure has occurred in reliance on those agreements'.<sup>349</sup> Similarly, the Department of Agriculture, Forestry and Fisheries (DAFF) submitted the executive grant and exceptional circumstances schemes, which it administers, should not be subject to review under the *ADJR Act*, as there are:

sufficient review mechanisms available for executive schemes administered by the department and that adding a statutory right of review for these schemes would add an extra layer of red-tape without providing significant benefit to applicants or agencies.<sup>350</sup>

5.46 The Council considers that the problem with providing for judicial review of grants decisions (which is theoretically available in the constitutional judicial review jurisdiction) is that the grounds of review would be limited, and remedies are likely to be ineffectual. The latter point is particularly significant, because the available grant money is likely to have been legitimately distributed to other persons when a judicial review remedy issues and thus a finding that a particular decision not to give a grant to a person was invalid is unlikely to lead

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<sup>348</sup> Department of Finance, *Discretionary Compensation and Waiver of Debt Mechanisms*, Finance Circular 2009/09 [76].

<sup>349</sup> Attorney-General's Department (Cth), Submission No 21 (9 August 2011) 4.

<sup>350</sup> Department of Agriculture, Fisheries and Forestry, Submission No 16 (1 July 2011) 3.



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to the money being granted to that person. Making a judicial review application of a grant decision is therefore unlikely to have much practical utility.

5.47 Some categories of emergency payments, for example large-scale programs responding to floods or fires, are likely to resemble more closely ordinary welfare payments. However, ordinary proof of identity requirements will often be less strict or removed altogether,<sup>351</sup> and evidence is normally not required of the particular disadvantage claimed at the time of application and payment. For people receiving payments, the time taken to process the claim is a critical factor, ensuring that they receive the payments they are entitled to, and are not overpaid.<sup>352</sup>

5.48 The Council considers that judicial review remedies are unlikely to be particularly useful in relation to grants decisions. Decisions regarding emergency payments tend to be time-critical and administered in such a way that few people miss out, and commercial decisions of government are likely to be subject to other legal remedies. Specifically extending review to these decisions would not significantly increase accountability for government action. The Council's model would mean that judicial review for these decisions would be available under the *ADJR Act* if the matter was within the High Court's jurisdiction under s 75(v) of the *Constitution*.

5.49 Overall, the Council no longer considers the specific extension of review to non-statutory schemes funded by an appropriation by Parliament, as previously recommended by the Council and adopted in Queensland, to be the most appropriate approach. Specifically to extend statutory review only to certain non-statutory decisions, where the application of judicial review principles is currently unclear, would place an unnecessary administrative burden on agencies administering those schemes. The discussion above illustrates that executive schemes all have particular considerations—for example urgency, broad discretion as to payments or large numbers of potentially eligible recipients—associated with their administration. The Council's model would provide for judicial review of executive schemes under the *ADJR Act* where it is also available under the *Constitution*. The Council's model would, however, allow for limited exclusions of *ADJR Act* review, for example, of decisions under the CDDA scheme.

### *Commercial decisions by government*

5.50 Commonwealth agencies expressed concerns in submissions about the extension of statutory judicial review to procurement, tender and contracting decisions. Constitutional judicial review of tender and procurement decisions may be available, but there is no decisive authority for this in the constitutional judicial review jurisdiction. There are some State and Territory cases that have held that administrative law remedies can issue in relation to tender processes where the body concerned is required to pay some attention to the 'public

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<sup>351</sup> Australian National Audit Office, *Emergency Management and Community Recovery Assistance in Centrelink*, Audit Report No 36 2009–10, Performance Audit, 23.

<sup>352</sup> *Ibid.*



interest’.<sup>353</sup> The Federal Court has commented that there may be some justification for judicial review where the legislature has set out procedures to be followed in a tender process and the question is whether those procedures have been followed.<sup>354</sup> If review were available, the grounds of review would likely relate to procedural fairness.

5.51 Private companies also carry out tendering processes. Aronson, Dyer and Groves note that tendering processes may sometimes be treated by the courts as implied ‘process contracts’, which incorporate some public law principles ‘rebranded’ as implied contractual obligations of good faith and good dealing.<sup>355</sup>

5.52 Procurement decisions are currently governed by various accountability frameworks, including the *Financial Management Act 1997* (Cth), and are subject to supervision by Finance.

5.53 In terms of contractual relationships, there are private law remedies available where those relationships break down. It is unclear why a decision to enter into a contract should be subject to judicial review, given that this is a power which government exercises in common with all persons. In *Griffith University v Tang*, Gummow, Callinan and Heydon JJ confirmed that decisions made under contract did not fall within the jurisdictional formula of the *ADJR Act*.<sup>356</sup> Australian courts are equally reluctant to allow common law judicial review to query the decisions of governments and their agencies about with whom and on what terms they enter contracts.<sup>357</sup>

5.54 As the Department of Defence points out, there are many means other than judicial review for resolving commercial disputes, which are perhaps more appropriate.<sup>358</sup> This may be why there have been few attempts to apply for judicial review of government commercial decisions, even though those decisions may be reviewable under constitutional judicial review.

5.55 Finance submitted that expanding the *ADJR Act* to include procurement decisions, would increase the compliance costs of agencies and suppliers, reduce the flexibility of the current framework and cause unnecessary delays.<sup>359</sup> The Department of Immigration and Citizenship (DIAC) argued that allowing review of an unsuccessful tender would have adverse consequences for all Commonwealth agencies and hamper the ability of the Commonwealth to obtain services in a timely and cost-effective manner.<sup>360</sup>

5.56 Billings and Cassimatis, however, considered that there should not be a ‘blanket exclusion of commercial decisions from the scope of judicial review’.<sup>361</sup> The Law Council of Australia argued that ‘the commercial impact of a decision is not an appropriate criterion for

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<sup>353</sup> See *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* (2000) ACTSC 89; *Dalcon Constructions Pty Ltd & Ors v State Housing Commission & Anor* (1998) 14 BCLR 477.

<sup>354</sup> See dicta comments in *General Newspapers Pty Ltd v Telstra Corporation* (1993) FCR 164, 173.

<sup>355</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 152.

<sup>356</sup> (2005) 221 CLR 99, 128–9.

<sup>357</sup> See, eg, *Khuu & Lee Pty Ltd v Adelaide City Corporation* (2011) 110 SASR 235.

<sup>358</sup> Department of Defence, Submission No 4 (24 June 2011) 5–6.

<sup>359</sup> Department of Finance and Deregulation, Submission No 19 (18 July 2011) 5.

<sup>360</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 6.

<sup>361</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 10.

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excluding judicial review’,<sup>362</sup> and submitted that the *ADJR Act* should align with the general law.

5.57 As discussed above, the scope of judicial review of the commercial decisions of government in the constitutional judicial review jurisdiction is currently unresolved. Probably some commercial decisions of government are subject to limited judicial review. The Council considers that commercial actions where the Government is acting as a private individual—such as contractual actions by government, procurement decisions and tendering decisions—are subject to accountability mechanisms other than judicial review. However, the Council considers that these issues could equally be argued under an amended *ADJR Act* as under s 39B of the *Judiciary Act*, and there is therefore no reason to specifically exclude these decisions.

### *The Council’s model and non-statutory decisions*

5.58 There are a range of exercises of non-statutory powers currently not reviewable under the *ADJR Act*. Many exercises of non-statutory powers are, at least in theory, reviewable under s 39B of the *Judiciary Act* and s 75(v) of the *Constitution*.

5.59 When many of these powers are considered individually, there is not necessarily a compelling need for judicial review of those decisions. However, the Council still considers there to be an underlying problem with the dual systems for applying for judicial review. In relation to executive schemes and grants programs, the Council notes that s 39B review would be available—even if the grounds of review are likely to be limited—and therefore considers that many of the concerns expressed by agencies are unlikely to be realised. The Council’s proposed model of drawing the constitutional review jurisdiction into the *ADJR Act* would therefore bring these decisions within the ambit of the *ADJR Act*, to the extent that constitutional judicial review already allows for their review.

5.60 However, some non-statutory decisions could be excluded from the operation of the expanded *ADJR Act*. The Council considers that limited exclusions would still be appropriate to address the concerns of government agencies about the expansion of review in certain areas. Exemptions which the Council considers appropriate—on the basis that only very limited review would be available under s 39B—are:

- CDDA decisions; and
- actions relating to war and the defence of the nation.

5.61 Such exemptions should be limited to decisions where there is a justification for limiting the availability of judicial review to its constitutional minimum.

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<sup>362</sup> Law Council of Australia, Submission No 23 (1 July 2011) [47].

## PRELIMINARY DECISIONS

### Summary

5.62 There has been some criticism of the *ADJR Act* requirement that a decision be ‘final and operative’ for the courts to have jurisdiction to review it under the Act, noting the ‘fine line’ between final decisions and preliminary steps or views.<sup>363</sup> In particular, judicial review proceedings cannot normally be commenced until a final or operative decision has been made.<sup>364</sup> By contrast, constitutional judicial review allows for review of some preliminary decisions, particularly reports or recommendations to final decision makers, as discussed below.

5.63 The Council recommended in its Report No 32 that reports and recommendations to final decision makers be made subject to review under the *ADJR Act*.<sup>365</sup> Submissions to this inquiry were divided on this issue. The Council has concluded that in some cases judicial review of reports and recommendations should explicitly be provided for by means of a schedule to the *ADJR Act*.

### Review under the *ADJR Act*

5.64 The *ADJR Act* allows for review of a ‘decision to which this Act applies’—but ‘decision’ is not defined. Aronson, Dyer and Groves note that ‘the Federal Court construed ‘decision’ extremely widely for most of the 1980s, so as to include interim or non-final decisions’.<sup>366</sup> This approach was overturned by the High Court in *Australian Broadcasting Tribunal v Bond (Bond)*.<sup>367</sup> Mason CJ concluded that:

a reviewable “decision” is one for which provision is made by or under statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration.<sup>368</sup>

5.65 However, Mason CJ considered that an intermediate decision might be subject to review, where ‘the statute provided for the making of a finding or ruling on that point so that the decision ... might accurately be described as a decision under an enactment’.<sup>369</sup> In addition, Mason CJ noted that ‘review of an ultimate or operative decision on permissible

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<sup>363</sup> Robin Creyke and John McMillan, *Control of Government Action. Text, Cases and Commentary* (LexisNexis, 2<sup>nd</sup> ed, 2009) 98. See, for example, *Right to Life Association (NSW) Inc v Secretary, Department of Human Services, Health* (1995) 56 FCR 50.

<sup>364</sup> *Ibid.*

<sup>365</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989).

<sup>366</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 59.

<sup>367</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

<sup>368</sup> *Ibid* 337.

<sup>369</sup> *Ibid.*

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grounds will expose for consideration the reasons which are given for the making of the decisions and the processes by which it is made'.<sup>370</sup>

### Constitutional judicial review

5.66 While review of preliminary decisions has not been heavily litigated, they are reviewable under s 39B of the *Judiciary Act* and s 75(v) of the *Constitution*. The only conditions of constitutional judicial review are the caveats that apply generally, namely that the constitutional writs are available and the preliminary decision is a 'matter'. Preliminary decisions that are reviewed are usually decisions made in reports or recommendations.<sup>371</sup>

5.67 The grounds of constitutional judicial review are closely related to the available remedies. The constitutional writs are available only for excess or denial of jurisdiction. Certiorari is an ancillary remedy available in the constitutional judicial review jurisdiction only where a jurisdictional error has occurred. Under the inherent jurisdiction of the superior courts of the UK, certiorari was traditionally not available to preliminary decisions that have no discernible legal effect. That is because certiorari quashes the 'legal effect of an act or decision ... but, if an act or decision has no legal effect, then there is nothing to quash'.<sup>372</sup> Thus, in *Ainsworth v Criminal Justice Commission*,<sup>373</sup> certiorari was not available because the recommendations to the Criminal Justice Commission had no legal effect or consequence attached to it.<sup>374</sup> However, in *Hot Holdings*,<sup>375</sup> certiorari was available for a preliminary decision in a non-binding recommendation as to whether a mining exploration licence should be granted. This is because the final determination could not be made before the recommendation was considered.<sup>376</sup> Consequently, as Cane and McDonald explain, the preliminary decision had a 'discernible legal effect'<sup>377</sup> upon the exercise of the final decision.<sup>378</sup> Therefore, for a court to issue a remedy in the constitutional judicial review jurisdiction there must be a jurisdictional error, and if certiorari is required then the preliminary decision in question must have a legal effect.

5.68 Where a process resulting in a recommendation to a final decision maker is undertaken for the express purpose of making a decision, as opposed to a factor in making a decision, it is likely to be subject to constitutional judicial review. In *Plaintiff M61 v Commonwealth*, the High Court held in relation to the decisions of independent merits reviewers, that:

inquiries made after a decision to consider exercising the relevant powers [under the *Migration Act 1958* (Cth)] and for the purposes of informing the Minister of

<sup>370</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 338.

<sup>371</sup> For example, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 and *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

<sup>372</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 595.

<sup>373</sup> (1992) 175 CLR 564.

<sup>374</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

<sup>375</sup> *Pty Ltd v Creasy* (1996) 185 CLR 149.

<sup>376</sup> *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149.

<sup>377</sup> *Ibid* 174.

<sup>378</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 72.

matters that were relevant to the decision whether to exercise one of those powers were subject to procedural fairness requirements because of their 'statutory foundation'. ... Once it is decided that the assessment and review processes were undertaken for the purpose of the Minister considering whether to exercise [his statutory powers], it follows from the consequences upon the claimant's liberty that the assessment and review must be procedurally fair and must address the relevant legal question or questions.<sup>379</sup>

5.69 Additionally, constitutional judicial review of a preliminary decision must involve a 'matter'. A matter is 'some immediate right, duty or liability to be established by the determination of the court' and no 'declaration of the law divorced from any attempt to administer that law'.<sup>380</sup> Matters are only present where there is a justiciable controversy.<sup>381</sup> Therefore, while constitutional judicial review does not require the decision to be final, the case may be that the preliminary decision does not affect an 'immediate right, duty or liability', but the final decision does. In such a scenario, constitutional judicial review does not offer an alternative avenue of review to the *ADJR Act*.

## Reports and recommendations to final decision makers

5.70 In Report No 32, the Council made specific recommendations to make reports and recommendations by bodies other than the final decision makers judicially reviewable prior to the final decision being made.<sup>382</sup> The Council noted that this was strongly criticised on the basis that it may frustrate the workings of government,<sup>383</sup> but suggested that it would do no more than mirror the situation at common law (ie under constitutional judicial review).<sup>384</sup> Courts would still have the discretion not to hear a matter if they did not consider it to be appropriate.

5.71 Currently, some reports are already reviewable under s 3(3) of the *ADJR Act*, which provides for review of 'the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law'. However, many reports are not themselves made under an enactment or law, but must be taken into account by the decision maker. Medical reports are one such example.

5.72 Many reports taken into account by decision makers are prepared by experts who are not officers of the Commonwealth, for example private medical examiners or language testing schools. Potentially, where the report is made by a person who is not an officer of the Commonwealth, the decision would not be captured directly by constitutional judicial review. In these cases, the validity of the report or a decision by a private person or body could possibly be challenged on the basis that the report or decision was central to the validity of the decision by an officer of the Commonwealth, and was itself invalid.

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<sup>379</sup> *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 351.

<sup>380</sup> *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265–7.

<sup>381</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 72.

<sup>382</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 90, rec 17.

<sup>383</sup> *Ibid* 91.

<sup>384</sup> *Ibid* 92.

## Chapter 5: Ambit of Review

5.73 In the Consultation Paper, the Council sought views as to whether reports and recommendations to final decision makers should be subject to judicial review under the *ADJR Act*. The Australian Crime Commission (ACC) considered it would be counterproductive to allow for review of reports and recommendations, as in most cases it would be ‘more practicable to challenge the decision once made than to seek an anticipatory remedy’.<sup>385</sup> However, NSW Young Lawyers, the Australian Network of Environmental Defenders Offices (ANEDO) and Victorian Legal Aid argued that judicial review under the *ADJR Act* should be extended to reports and recommendations made by bodies other than the final decision maker prior to the final decision being made, particularly where they have the capacity to affect a person’s rights or interests.<sup>386</sup>

5.74 DIAC pointed out that ‘the Courts have, in limited circumstances, shown a willingness to scrutinise the decisions of independent experts’.<sup>387</sup> An example following *Plaintiff M61*<sup>388</sup> is the case of *Maman v Minister for Immigration*,<sup>389</sup> in which Raphael FM held that an assessment by a social worker (acting as an independent expert) that Mr Maman had not suffered family violence was flawed, because the expert was required to provide the applicant with procedural fairness in the preparation of the report, and procedural fairness had not been afforded. Raphael FM came to the conclusion that the independent expert’s decision was made ‘under’ the *Migration Act 1958* (Cth) (*Migration Act*) for the purposes of the privative clause in s 474, and was therefore reviewable by the Federal Magistrates Court, and subject to procedural fairness requirements.<sup>390</sup> The Refugee Review Tribunal had regard to the expert’s assessment. Raphael FM came to the conclusion that the independent expert’s decision was made *under* the *Migration Act* for the purposes of the privative clause in s 474, and was therefore reviewable by the Federal Magistrates Court under s 476, and subject to procedural fairness requirements.<sup>391</sup> On appeal the Full Federal Court (Flick, Foster and Katzmann JJ) upheld the decision of Raphael FM.<sup>392</sup>

5.75 In *SZQDZ v MIAC*<sup>393</sup> the Full Federal Court (Keane CJ, Rares and Perram JJ), in considering whether time limits applied to applications for judicial review of independent merits reviewers’ decisions, decided that these were not decisions but recommendations without any statutory force and merely a procedural step in the course of arriving at a substantive determination.

5.76 At the time of writing, the High Court’s decision is reserved in *Plaintiffs S10/2011, S49/2011 and S51/2011 v MIAC* on whether procedural fairness must be followed in the

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<sup>385</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 3–4.

<sup>386</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 6; Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 3; Victorian Legal Aid, Submission No 14 (7 July 2011) 3.

<sup>387</sup> See *Blair v Minister for Immigration & Multicultural Affairs* [2001] FCA 1014; *Maman v Minister for Immigration and Anor* (2011) 252 FLR 254.

<sup>388</sup> *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 352, citing to *Annetts v McCann* (1990) 170 CLR 597.

<sup>389</sup> (2011) 252 FLR 254.

<sup>390</sup> *Maman v Minister for Immigration* (2011) 252 FLR 254 [19].

<sup>391</sup> *Ibid.*

<sup>392</sup> *MIAC v Maman* [2012] FCAFC 13.

<sup>393</sup> [2012] FCAFC 26.



process leading to a recommendation to the Minister on whether to exercise the personal powers under ss 48B, 351 and 417 of the *Migration Act*. Meanwhile *Plaintiff M61* and *Maman* are examples of cases where the courts have been willing to apply judicial review standards to preliminary decisions that are made for the purpose of a final decision given effect by statute, where the statutory power ‘confers power to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations’.<sup>394</sup>

5.77 Victorian Legal Aid provided examples of reports conducted by bodies other than the Department of Immigration and Citizenship (DIAC) in a visa application which are prerequisites to the grant of a visa, such as security risk assessments conducted by the Australian Security Intelligence Organisation (ASIO), criminal histories provided by the Australian Federal Police and health checks conducted by Health Services Australia.<sup>395</sup> However, DIAC submitted that if reports and recommendations were subject to judicial review, it would ‘significantly impede’ the efficient decision making capabilities of the Department and undermine administrative certainty which is required for an application to be processed.<sup>396</sup> DIAC noted that many reports used in the migration decision making process could be captured in ‘preliminary decisions’, including reports from Medical Officers of the Commonwealth and reports on applicants’ English language capabilities. DIAC argued that the courts’ past reluctance to decline to review reports or recommendations would not be sufficient to protect DIAC’s interests, as applications to the Court and interlocutory proceedings would still take time.<sup>397</sup> DIAC expressed further concern with the costs and delays involved if reports and recommendations would be reviewable in addition to the final decision being subject to review.<sup>398</sup>

5.78 Security assessments by ASIO are currently excluded from the ambit of the *ADJR Act*, and would be separately reviewable as decisions under an enactment if this exclusion were removed. Security assessments are usually only subject to extremely limited judicial review, even where they are reviewable under constitutional judicial review because of limits on the information which can be given in reasons and in evidence.<sup>399</sup>

5.79 It is unclear why providing a criminal history would raise administrative law issues, as a history is merely factual material, and does not require any discretionary decision to be made. It may be that many reports provided to decision makers fall into this category, which may raise issues in terms of encouraging challenges to reports that are largely factual in nature—for example, reports that are the result of a database search rather than a discretionary decision-making process.

5.80 DIAC indicated that health checks should not be subject to statutory judicial review, while Victorian Legal Aid considered that health checks should be subject to challenge on judicial review grounds. In the migration jurisdiction, the opinions of medical examiners are

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<sup>394</sup> *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 352, citing to *Annetts v McCann* (1990) 170 CLR 597.

<sup>395</sup> Victoria Legal Aid, Submission No 14 (7 July 2011) 3.

<sup>396</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 3.

<sup>397</sup> *Ibid.*

<sup>398</sup> *Ibid.*

<sup>399</sup> See *Sagar v O’Sullivan* (2011) 193 FCR 311.



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only subject to limited judicial review, for example review of whether the person making the medical report is properly appointed, not review of the decision-making process itself.<sup>400</sup> Importantly, however, a challenge to the validity of the medical report is usually made as an element of a challenge to the final decision by the Migration Review Tribunal–Refugee Review Tribunal (MRT-RRT), rather than as a separate action.

5.81 The Law Council of Australia supported a broader amendment to the *ADJR Act* to overcome the requirement in *Bond* that a ‘decision to which this Act applies’ must be ‘final or ultimate or operative’. The Law Council argued that this requirement is not supported by the text of the *ADJR Act* and has resulted in an ‘undesirable proliferation of litigation on a technical issue of justiciability’.<sup>401</sup> They noted that the same requirement does not apply in relation to review under the *Judiciary Act*. They argued that the Court can be given an additional basis for discretion to decline to exercise jurisdiction under s 10(2)(b) of the *ADJR Act* in order to combat concerns about ‘abuse’ of the Act.<sup>402</sup> The Council does not support this approach on the basis that the jurisdictional test in the *ADJR Act* is now relatively settled, and the Council’s preferred approach to expanding the jurisdiction of the Act would allow for review of preliminary decisions to the extent this is already available via constitutional judicial review.

### Providing for judicial review in particular cases

5.82 There are a variety of reports and recommendations to original decision makers which have an essentially conclusive effect for the purposes of the final decision, while being preliminary decisions. In some cases these preliminary decisions, because of their conclusive legal effect and the nature of the decision, should possibly be subject to judicial review. In other cases, some expert reports may be unsuitable for judicial review, for example because the report is entirely factual in nature and review applications are only likely to delay the decision-making process, or because the decision relates to an investigation process. It is also difficult to define at what point advice to the final decision maker becomes a ‘report or recommendation’, and this could lead to a lack of clarity concerning the point at which a person needs to be afforded procedural fairness in relation to preliminary recommendations or report.

5.83 The Council therefore considers that agencies should, in relation both to existing and new decision-making structures, consider the accountability mechanisms which currently apply to bodies that make reports and recommendations, and consider whether those reports and recommendations should be subject to statutory judicial review. This could be achieved by giving those decisions statutory status such that they were ‘decisions under an enactment’.

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<sup>400</sup> See for example *Reynolds v Minister for Immigration & Anor* (2010) 237 FCR 7.

<sup>401</sup> Law Council of Australia, Submission No 23 (1 July 2011) [13].

<sup>402</sup> Ibid [17].

5.84 Factors which indicate that reports or recommendations should be subject to judicial review include that they:

- are made by another officer of the Commonwealth (and are therefore already reviewable under s 39B);
- are based on an assessment process where a person should be afforded procedural fairness; and
- have a conclusive effect for the purposes of the final decision.

5.85 However, there are also factors which indicate that a report or recommendation should not be subject to statutory judicial review, namely that the report or recommendation:

- is of a completely factual nature; and
- is an assessment of a professional nature and judicial review standards, such as procedural fairness, do not apply to the decision-making process.

5.86 The Council acknowledges that an assessment of the appropriateness of judicial review in the circumstances may require balancing some of these factors against one another. For example, a report may be both conclusive and factual. Where a report or recommendation is appropriate for review, it could be specifically listed in the *ADJR Act* as a decision subject to review.

### **Recommendation 2**

The application of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to reports and recommendations should be dealt with in the following way:

- (a) A report or recommendation that is made in the exercise of a power conferred by an enactment, prior to the making of a decision under that enactment, should be a decision to which the Act applies, as currently required by s 3(3) of the Act.
- (b) A schedule to the Act that can be amended by regulation should list other reports and recommendations that are decisions to which the Act applies.

## **SUBORDINATE LEGISLATION**

### **Summary**

5.87 The *ADJR Act* is restricted to decisions of an administrative character.<sup>403</sup> A number of submissions to the inquiry supported the extension of the *ADJR Act* to allow for judicial review of subordinate legislation. Most submissions argued that because judicial review of

<sup>403</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3.

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subordinate legislation is available under constitutional judicial review, it should therefore also be available under the *ADJR Act*.

5.88 The Council considers that it is important to distinguish between direct and indirect review of subordinate legislation. Indirect review of the validity of a legislative instrument, by a challenge to the validity of a decision made under that instrument, is currently available under both the *ADJR Act* and constitutional judicial review. The Council's model of judicial review, discussed in Chapter 4, allows for direct review of subordinate legislation under the *ADJR Act* to the same extent as it is available under constitutional judicial review. Therefore, the Council does not consider that a specific extension of the *ADJR Act* to allow for judicial review of subordinate legislation is necessary.

### Judicial review of subordinate legislation

5.89 As Emeritus Professor Mark Aronson explains, the *ADJR Act* definition of 'decisions to which this Act applies', which includes only 'administrative decisions',<sup>404</sup> was based on concerns about courts reviewing policy decisions.<sup>405</sup> Courts have defined 'administrative' decisions as those that are not legislative or judicial.<sup>406</sup> The *ADJR Act* does not cover the making of subordinate legislation, as this represents a decision that is legislative rather than administrative in character.<sup>407</sup> Section 5 of the *Legislative Instruments Act 2003* (Cth) (*Legislative Instruments Act*) defines a 'legislative instrument' as an instrument in writing of a legislative character that is or was made in the exercise of a power delegated by the Parliament. Examples include instruments that determine the law and alter the content of the law, or affect a privilege or interest, impose an obligation, or create a right.

5.90 The distinction between legislative and administrative action is not always clear, and there are many examples of executive action that are hybrids of the two. In some cases, legislative action is preceded by consideration of criteria as a precondition for the exercise of a power.<sup>408</sup> In other cases, an instrument may contain provisions of a legislative character as well as provisions of an administrative character. The *Legislative Instruments Act* provides that such an instrument is a legislative instrument for the purposes of the Act.<sup>409</sup> Although the *ADJR Act* does not allow judicial review of the actions of rule makers in making legislative instruments, these decisions may be reviewed under constitutional judicial review.<sup>410</sup> An administrative decision can also be challenged under the *ADJR Act* on the ground that it has

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<sup>404</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3.

<sup>405</sup> Mark Aronson, 'Is the ADJR Act hampering the development of Australian Administrative Law' (2004) 15 *Public Law Review* 202, 202–03.

<sup>406</sup> *Griffith University v Tang* (2005) 221 CLR 99, 123.

<sup>407</sup> *RG Capital Radio Ltd v Australian Broadcasting Authority* (2001) 113 FCR 185; *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.

<sup>408</sup> For example s 37A of the *Environment and Biodiversity Protection Act 1999* (Cth) requires consideration of certain prerequisites before the Minister may make a declaration under that section, which is a legislative instrument.

<sup>409</sup> *Legislative Instruments Act 2003* (Cth) s 5(4).

<sup>410</sup> *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451.

no legislative support—including because the decision was made under an invalid instrument.<sup>411</sup>

5.91 The main argument advanced in submissions for extending review to delegated legislation is that review is already available under s 39B of the *Judiciary Act*, and that there is no valid reason for excluding it under the *ADJR Act*.<sup>412</sup> Billings and Cassimatis argued that there is no ‘principled justification’ for subordinate legislation being excluded from review under the *ADJR Act*, especially provided that judicial review of delegated legislation is available under constitutional judicial review.<sup>413</sup> They noted that the requirement in the *ADJR Act* that a decision be of an ‘administrative character’ would need to be removed.

5.92 However, the validity of delegated legislation is rarely challenged directly under constitutional judicial review, even though it is possible to do this on the basis that it is an action taken by an ‘officer of the Commonwealth’. It is more usual that the validity of delegated legislation is challenged on the basis that an administrative decision is invalid because the delegated legislation supporting that decision is also invalid. The validity of delegated legislation could be challenged therefore as an element of either a constitutional judicial review or an *ADJR Act* application.

5.93 Questions of standing are less likely to arise when an indirect challenge of this kind is undertaken. In relation to a direct challenge to a legislative instrument under constitutional judicial review, an applicant would need to show they have standing to challenge the instrument directly, and this may be difficult in cases where the instrument creates a general decision-making structure. However, where an instrument applies a rule to a class of persons, any person in that class would be likely to have standing to challenge the instrument directly.

5.94 Review of delegated legislation under constitutional judicial review is not necessarily available on the same grounds as review of administrative decisions, though there is considerable overlap. As Professor Dennis Pearce and Stephen Argument have explained, the grounds upon which delegated legislation can be found to be invalid ‘are regarded as branches of the general doctrine of *ultra vires*’.<sup>414</sup> Pearce and Argument identify the principal grounds of review under this banner as: non-compliance with formal requirements; dealing with a subject not within the scope of the power provided by the empowering Act; and inconsistency with the law.<sup>415</sup> Procedural fairness requirements are unlikely to apply to the making of delegated legislation because of the fact that legislative instruments are likely to affect the community at large. In *Kioa v West*, Brennan J stated that:

[the] legislature is not likely to intend that a statutory power of a strictly legislative nature be conditioned on the observance of the principles of natural justice, for

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<sup>411</sup> *Magno v Minister for Foreign Affairs and Trade* (1992) 35 FCR 235.

<sup>412</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 2; Law Council of Australia, Submission No 23 (1 July 2011) [8]–[10]; Greg Weeks, Submission No 8 (1 July 2011) 2.

<sup>413</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 2.

<sup>414</sup> Dennis Pearce & Stephen Argument, *Delegated Legislation in Australia* (2009, 3<sup>rd</sup> ed, LexisNexis) 114.

<sup>415</sup> *Ibid.*

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the interests of all members of the public are affected in the same way by the exercise of such a power.<sup>416</sup>

The remedy granted is typically a declaration of invalidity.

5.95 Some submissions suggested that not all the s 5 grounds should be available for review of delegated legislation.<sup>417</sup> However, High Court authority indicates that *ADJR Act* grounds will not be available in relation to a particular decision if they would not be available under constitutional judicial review. In *Kioa v West*,<sup>418</sup> it was argued that the effect of s 5(1)(a) was that all decisions are now subject to natural justice; but the court rejected that view and held that natural justice only applies where the common law (or constitutional judicial review) previously applied it. The court may take the same view if the making of delegated legislation is reviewable under the *ADJR Act*. Therefore this could be addressed by specifically listing—and narrowing—the grounds that did apply; or by leaving it to the courts to resolve in the manner explained in *Kioa* by applying constitutional judicial review grounds developed at common law.

5.96 NSW Young Lawyers submitted that subordinate legislation that can, at the least, be partially characterised as containing an administrative decision, should be reviewable under the *ADJR Act*.<sup>419</sup> Currently the administrative aspects of an instrument may be subject to review under the *ADJR Act*, though the legislative aspects will not.<sup>420</sup> However, item 21 of Part 1 of Schedule 1 of the *Legislative Instruments Regulations 2004* provides that an instrument is declared not to be a legislative instrument if it is an instrument the making or issue of which is a decision that is reviewable under the *ADJR Act*. This could potentially create some confusion about the interaction between the two Acts. The 2008 *Review of the Legislative Instruments Act 2003* recommended that item 21 be removed from the Act, because the provision was ‘confusing and unhelpful’.<sup>421</sup>

5.97 NSW Young Lawyers expressed concern with all subordinate legislation being subject to review, and noted that purely legislative instruments should not be reviewable, especially where they ‘affect the general populace’.<sup>422</sup> Agencies also did not support the extension of the *ADJR Act* to subordinate instruments.<sup>423</sup> Department of Agriculture, Fisheries and Forestry (DAFF) submitted that ‘any changes to the statutory judicial review process to include decisions about subordinate legislation in the decisions that can be reviewed under judicial review may have a significant impact on the department and/or

<sup>416</sup> *Kioa v West* (1985) 159 CLR 550. See Dennis Pearce & Stephen Argument, *Delegated Legislation in Australia* (2009, 3<sup>rd</sup> ed, LexisNexis) 124–126 for discussion of application of this principle.

<sup>417</sup> Law Council of Australia, Submission No 23 (1 July 2011) [12]; Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 3.

<sup>418</sup> (1985) 159 CLR 550.

<sup>419</sup> Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 6.

<sup>420</sup> *McWilliam v Civil Aviation Safety Authority* (2004) 82 ALD 655.

<sup>421</sup> Legislative Instruments Act Review Committee, *2008 Review of the Legislative Instruments Act 2003* (Commonwealth of Australia, 2008) 17.

<sup>422</sup> Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 6.

<sup>423</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 3; Department of Agriculture, Fisheries and Forestry, Submission No 16 (1 July 2011); Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 3.

portfolio agencies and related industries'.<sup>424</sup> DIAC argued that subjecting subordinate legislation to judicial review 'is to then open public policy to the Courts'.<sup>425</sup>

5.98 A number of government agencies argued that existing accountability mechanisms, including the scheme for review and disallowance in the *Legislative Instruments Act* and the scrutiny of legislation undertaken by Senate Committee on Regulations and Ordinances provided sufficient accountability for legislative instruments.<sup>426</sup> However, the Law Council of Australia asserted that it is important that subordinate legislation is reviewable under the *ADJR Act*, as scrutiny by the relevant parliamentary committee cannot be relied on to remove all cases of *ultra vires* instruments.<sup>427</sup>

5.99 The Senate Committee on Regulations and Ordinances cannot make a binding statement as to the legality of an instrument. Rather, the Committee assesses tabled instruments against a list of criteria set by the Committee. The Senate Committee on Regulations and Ordinances criteria are whether the delegated legislation:

- is in accordance with the statute;
- trespasses unduly on personal rights and liberties;
- makes rights unduly dependent on administrative decisions which are not subject to independent review of their merits; or
- contains matters more appropriate for parliamentary enactment.

5.100 These criteria all reflect important principles of administrative law, and the first reflects the kind of inquiry that a court would undertake in assessing the legality of an instrument. The Committee's ability to recommend that an instrument be subject to amendment or disallowance is also a powerful consequence of not complying with the criteria. However, as explained by Creyke and McMillan, the Committee typically relies upon 'suggestion and persuasion to influence executive action'.<sup>428</sup> Usually, agencies will amend an instrument upon receiving a notice of motion from the Committee.

5.101 The existing accountability mechanisms for the exercise of a rule-making power recognise that legislative actions may have broad and enduring application. The *Legislative Instruments Act* provides an accountability regime for legislative instruments through requirements for consultation, registration, disallowance and sunseting (the automatic repeal of instruments after a set period of time).

5.102 In the Council's view, there are a number of reasons why delegated legislation should not be directly subject to review under the *ADJR Act*. The making of delegated legislation is a different kind of action from other actions taken by members of the executive

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<sup>424</sup> Department of Agriculture, Fisheries and Forestry, Submission No 16 (1 July 2011) 2.

<sup>425</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 3.

<sup>426</sup> Department of Agriculture, Fisheries and Forestry, Submission No 16 (1 July 2011) 2; Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 4; Australian Crime Commission, Submission No 5 (6 July 2011) 3.

<sup>427</sup> Law Council of Australia, Submission No 23 (1 July 2011) [10].

<sup>428</sup> Robin Creyke and John McMillan, *Control of Government Action* (LexisNexis, 2<sup>nd</sup> ed, 2009) 396.



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government. Delegated legislation is subject to Parliamentary scrutiny and disallowance, and is of general application, rather than applying to a particular person. It is also subject to a comprehensive accountability scheme set out in the *Legislative Instruments Act*. The validity of delegated legislation can already be challenged indirectly under the *ADJR Act* and both indirectly and directly under constitutional judicial review. However, indirect challenge appears to be the usual means of challenging delegated legislation, and is less likely to raise issues of standing. In addition, the grounds of review for delegated legislation are not the same as for review of administrative decisions, reflecting the different nature of the decision itself and the type of review.

5.103 The Council considers that extending *ADJR Act* review to cover legislative instruments would move away from the original purpose of the Act, which was clearly focused on the administrative actions of the executive government.

## EXCLUSIONS FROM STATUTORY REVIEW

### Summary

5.104 There are several ways in which review under the *ADJR Act* is excluded. The first is the exclusion of decisions of the Governor-General from the definition of ‘decision’. The second is the specific list of exemptions in Schedule 1. The third is through general principles relating to the appropriateness of particular questions for judicial resolution, resolved by the courts.

5.105 The Council has, based on its previous publications, developed general principles that may justify exclusions from the *ADJR Act*. The Council has considered specific Schedule 1 exemptions, and these are discussed and the Council’s recommendations summarised in **Appendix B**. The Council has also concluded that decisions of the Governor-General should no longer be excluded from the definition of a decision to which the Act applies in the *ADJR Act*, and that decisions by the Governor-General should instead be excluded on a case-by-case basis according to the general principles. The Council has also considered the broader notion of ‘justiciability’ in relation to review and has concluded, contrary to previous recommendations of the Council, that an express reference to justiciability should not be included in the *ADJR Act*.

5.106 Schedule 1 of the *ADJR Act* includes a long list of Acts and provisions, decisions made under which are exempt from the *ADJR Act*. In the following section of the chapter, the Council outlines some general principles for exemptions from the *ADJR Act*, and considers each of the current exemptions with reference to those principles.

### Principles justifying the exemption of *ADJR Act* review

5.107 Schedule 1 of the *ADJR Act* includes a long list of Acts and provisions, decisions made under which are exempt from the *ADJR Act*. The Council has developed general principles for exemptions from the *ADJR Act*, and in **Appendices B** and **C** considers each of



the current exemptions with reference to those principles. The Council also considers that a principles-based approach justifies the inclusion of one more general exclusion from the ambit of the *ADJR Act*—applications to commence civil penalty proceedings.

5.108 Some of the exemptions were previously considered by the Council in 1989 in Report No 32, and the Council's views at that time are noted in relation to particular decisions in **Appendix B**.<sup>429</sup> The Council also considered exemptions from judicial review in its Report No 47, *The Scope of Judicial Review* (2006).

5.109 A number of agencies responsible for Acts and provisions in Schedule 1 have argued for the maintenance of some of the exemptions.<sup>430</sup> Billings and Cassimatis submitted that any exemptions should 'complement the Constitutional jurisprudence on jurisdictional error'.<sup>431</sup> They also argued that the discretionary grounds for restricting judicial review 'might be better articulated'.<sup>432</sup> The Law Council of Australia also supported some principles-based exemptions.<sup>433</sup>

### *Principles*

5.110 The Council considers that judicial review is not always the most appropriate means of dealing with a particular dispute, and that the Federal Court is not always the most appropriate forum for the resolution of disputes. The Council has considered its previous views on the subject, and considers that the following principles justify exemption from the *ADJR Act*.

- *Review is also not available under s 39B.* Some decisions may be most appropriate to be heard in the High Court in the first instance. In this case, an exemption from both the *ADJR Act* and s 39B of the *Judiciary Act* is appropriate.
- *A well-established alternative scheme already exists which is as accessible and effective as ADJR Act review.* In some cases, for example taxation decisions, there is a comprehensive review scheme, which will often provide for both merits and judicial review, which is accessible to applicants and achieves the same or better results in terms of remedies. Where such a scheme already exists, removing the *ADJR Act* exemption may make the system less efficient and effective overall.

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<sup>429</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989).

<sup>430</sup> Attorney-General's Department (Cth), Submission No 21 (9 August 2011) 6–7; Department of Defence, Submission No 4 (24 June 2011) 4–5; Department of Finance and Deregulation, Submission No 19 (18 July 2011) 6.

<sup>431</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 9.

<sup>432</sup> *Ibid.*

<sup>433</sup> Law Council of Australia, Submission No 23 (1 July 2011) 8–9.

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- *Where review has the potential to fragment or frustrate another legal process which is already underway.* In Report No 47, the Council examined the possibility that judicial review can lead to the fragmentation of criminal justice proceedings:

There is a strong argument that any determination of the lawfulness of government activity related to a substantive criminal proceeding should be a matter for the court adjudging that proceeding and not another court<sup>434</sup>

This does not involve any limitation on the opportunity for judicial review, because there is still an avenue for judicial consideration of the relevant decisions.

- *Where ADJR Act review could pose a risk to personal safety.* This exemption applies in limited cases. It may be that some interim orders made under statute are designed to protect people from security threats, and that such decisions are not appropriate for review. The other case currently listed in Schedule 1 is the National Witness Protection Program, where the legislation as a whole provides for the protection of federal witnesses, and the protection of personal information is particularly important.
- *Where decisions relate to representatives of the diplomatic or consular community.* Issues related to such decisions are settled by the traditional diplomatic means of discussion, consultation and negotiation and not by resort to the formal mechanisms of Australian legislation. This mode of proceeding is consistent with international practice in the conduct of diplomatic and consular relations.
- *Particular decisions relating to the management of the national economy, which do not directly affect the interests of individuals, and are likely to be most appropriately resolved in the High Court.* Exemptions such as this will be rare, and include, for example, decisions by the Treasurer to make payments out of the Consolidated Revenue Fund.
- *Decisions which have a strong link with other constitutional considerations, and as such are better dealt with via constitutional review.* The relevant example is electoral boundary decisions, and also decisions relating to appropriations.
- *Decisions relating to the deployment or discipline of defence force members.* These exemptions recognise the special status of decisions regarding the Defence Forces, in particular: the voluntary nature of military service, the importance of hierarchy and discipline, and the existence of alternative review mechanisms within the military context. The Council agrees that there is a strong argument for deferring to the expertise of Defence in this area, however that would be subject to ensuring transparency and fairness of the processes adopted.

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<sup>434</sup>

Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2003) 38.

*National security decisions*

5.111 The Council considers that national security may justify an exemption, but should not be used as a blanket justification. The Council notes that constitutional judicial review of these decisions is still available.

5.112 In 1989, the majority of the Council was of the view that these decisions should not be excluded from the ambit of the *ADJR Act*, but a minority of the Council disagreed. The majority was of the view that:

- the High Court had expressed the view that security agencies should not be free from judicial review (*Church of Scientology v Woodward*);<sup>435</sup>
- the *ADJR Act* was not an additional review right, but a more satisfactory avenue for review; and
- the availability of review in the Security Appeals Tribunals was relevant to the grant of a remedy, but not to the availability of review.<sup>436</sup>

5.113 However, a minority view in 1989 was that if responsible government agencies considered that review of security decisions would compromise the operations of security agencies then those decisions should not be subject to *ADJR Act* review.<sup>437</sup>

5.114 The exemption of these acts is justified with reference to national security considerations. In submissions to the current inquiry, the Attorney-General's Department (AGD) supported maintaining these exemptions for the following reasons:

These are matters of national security, and the exclusions are based on the fact that decisions made under those Acts are likely to be made on the basis of sensitive classified information, and with regard to operational matters not appropriate for public dissemination. Where appropriate, those Acts may contain mechanisms to provide appropriate review or notification requirements, which have been developed to balance the interests of national security with procedural fairness.<sup>438</sup>

5.115 It seems that the main objection here is to the dissemination of information to the public. This indicates that the main concern is reasons for decisions rather than judicial review proceedings themselves—discovery rules in an *ADJR Act* proceeding would be the same as for a constitutional judicial review application.

5.116 The Council sought further information from the AGD as to how the removal of national security-related exemptions would affect the operation of national security agencies. The AGD was of the view that removal of the Schedule 1 exemptions would be likely to affect the operation of intelligence organisations, even where there could be an exemption

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<sup>435</sup> (1982) 154 CLR 25.

<sup>436</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 62.

<sup>437</sup> Ibid 80–81.

<sup>438</sup> Attorney-General's Department (Cth), Submission No 21 (9 August 2011) 6.

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from the right to request reasons. Largely this appears to be because of the potential for the numbers of judicial review applications to increase if review was available under the *ADJR Act*. The Department considered that the Acts themselves balanced national security considerations with review rights and procedural fairness considerations. The AGD submitted that providing for judicial review under the *ADJR Act* would risk an increase in applications for review and a resulting risk that information about national security agencies' operations would emerge in a piecemeal fashion, eventually providing a picture of those operations.

5.117 The Council raised the question of whether concerns about information could be dealt with through a Schedule 2 exemption from s 13 of the *ADJR Act*, as opposed to a Schedule 1 exemption. The AGD commented that:

Even if an exemption from the right to give reasons were provided for decisions under these Acts, the Department contends that in many instances the release of any amount of information could contribute to a 'mosaic effect'. That is, serious offenders or intelligence operatives of foreign powers could gain access to enough pieces of information to construct a picture of the covert investigation procedures employed by the intelligence and law enforcement agencies concerned, allowing persons of interest to modify their mode of operation to avoid investigation or prosecution.

5.118 The Council considers that national security considerations may be a reason for excluding *ADJR Act* review, particularly where sensitive information is involved which increased litigation in the area may potentially expose. However, the Council does not consider that 'national security' should be a blanket reason for an exemption. Each national security exemption should therefore be considered on its own merits, with regard to whether review of the decisions could pose a risk to national security through the dissemination of information through judicial review proceedings.

### *New general exemptions*

5.119 As noted above in Report No 47, the Council examined the possibility that judicial review can lead to the fragmentation of criminal justice proceedings. Section 9A of the *ADJR Act* currently contains a provision limiting judicial review of decisions related to criminal justice process decisions once criminal proceedings have commenced.

5.120 The Council also considered other kinds of legal proceedings where judicial review is inappropriate because the issues were already subject to judicial review in another proceeding:

The same applies to judicial review of proceedings for civil penalties and for extradition: the court hearing the substantive proceeding is best placed to determine any collateral matters in relation to the lawfulness of associated government activity... Although it might limit the scope of review available in particular courts, it does not in fact limit the opportunity for judicial review.<sup>439</sup>

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<sup>439</sup> Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2003) 39.

5.121 This conclusion is reflected in Report No 47's 'Framework of indicative principles', which says that limits on judicial review are justified in decisions in relation to criminal, civil penalty or extradition proceedings.<sup>440</sup> The Council's view is that the *ADJR Act* should also not apply to decisions to commence civil penalty proceedings.

### **Recommendation 3**

Review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should not apply to decisions to commence civil penalty proceedings.

## **Decisions of the Governor-General**

5.122 Currently, statutory decisions of the Governor-General are excluded from review under the *ADJR Act*. Under Commonwealth law, the Governor-General makes a variety of decisions, for example dismissal of statutory office holders who cannot be removed without cause. In exercising power under statute, the Governor-General must act with the advice of the Executive Council and Ministers.<sup>441</sup>

5.123 Decisions of Ministers under statute, on the other hand, are susceptible to review under the *ADJR Act*. Courts have struggled to separate decisions taken by the Governor-General from the ministerial and departmental advice that informs those vice-regal decisions. The cases do not reveal a coherent approach. In *Steiner v Attorney-General*, the Federal Court held that ministerial advice to the Governor-General was outside the *ADJR Act*, otherwise the exclusion of the former from the *ADJR Act* would be defeated.<sup>442</sup> But soon after in *Squires v Attorney-General*, the Federal Court held that ministerial advice to the Governor-General *was* amenable to review under the *ADJR Act*, but actions within the minister's department preceding this advice were not.<sup>443</sup>

5.124 Vice-regal immunity has been removed from constitutional judicial review.<sup>444</sup> Decisions of the Governor are subject to statutory judicial review in Queensland<sup>445</sup> and Tasmania.<sup>446</sup>

5.125 While decisions made by the Governor-General exercising prerogative power may be non-justiciable—discussed above in relation to executive power and below in relation to justiciability—the Council recommended in Report No 32 that the *ADJR Act* apply to statutory decisions of the Governor-General.<sup>447</sup> The Council suggested that the definition of

<sup>440</sup> Administrative Review Council, *The Scope of Judicial Review*, Report No 47 (2003) 57.

<sup>441</sup> See *Acts Interpretation Act 1901* (Cth) s 16A.

<sup>442</sup> (1983) 52 ALR 148.

<sup>443</sup> (1986) 68 ALR 521.

<sup>444</sup> *R v Toobey; Ex parte Northern Land Council* (1981) 151 CLR 170. For later cases, see Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law' (2004) 15 *Public Law Review* 202, 206. This is also the approach in South Africa, see *Promotion of Administrative Justice Act 2000* (South Africa) s 1.

<sup>445</sup> *Judicial Review Act 1991* (Qld).

<sup>446</sup> *Judicial Review Act 2000* (Tas).

<sup>447</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 2.

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decision to which the *ADJR Act* applies be amended to remove the present exclusion of decisions of the Governor-General made under an enactment, and the Minister responsible for the advice tendered to the Governor-General be named as respondent.<sup>448</sup>

5.126 In the Consultation Paper, this Council sought views on whether statutory decisions of the Governor-General should be subject to review under the *ADJR Act*. Some submissions supported the removal of the exclusion.<sup>449</sup> However, two specific concerns were raised regarding statutory decisions of the Governor-General in relation to defence, and also decisions of the Governor-General to make statutory appointments.

5.127 The Department of Defence expressed strong concerns should the exclusion of the Governor-General's decisions be removed. The Department noted examples of decisions made by the Governor-General that are vitally important to the administration of the Department and the conduct of military operations, including powers under the *Defence Act 1903* (Cth) to call out the Defence Force and the Reserves and decisions under Defence Regulations about the appointment and promotion of officers in the Defence Force. The Department argued that the exercise of these powers is not an appropriate subject for judicial review as it is an 'essential duty of the Executive to take action to use the Defence Force to protect the nation and in this respect, has close parallels with other prerogatives of the Crown'. Such decisions need finality and certainty from the moment they are made.<sup>450</sup>

5.128 The Council considers that the most compelling reason for excluding these decisions from the operation of the *ADJR Act* would be the urgent nature of the decision and the fact that the power is unlikely to be used frequently, which would mean that an application to the High Court in the first instance would be the most appropriate form of review. The Council therefore considers that, if the general exemption for statutory decisions of the Governor-General were to be removed, these decisions could be exempt from review in schedule 1.

5.129 The Department of Defence's other concern was in relation to the promotion and appointment of officers within the Defence Force, arguing that:

The discretion that is inherent in the exercise of those powers is essential to the operational effectiveness of the Defence Force. It recognises the imperative of maintaining leadership and discipline in the Defence Force ... Enabling statutory avenues for judicial intervention into the appointment and promotion of officers who make up the command structure risks adversely affecting the ability of the Defence Force to command the loyalty and devotion to duty of subordinates, including in circumstances of extreme danger.<sup>451</sup>

5.130 It is unlikely that a successful review application would be made under the *ADJR Act* in relation to these decisions. The Council considers that the arguments above in relation to the need to avoid delay are not as significant here. However, if the Department of

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<sup>448</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) rec 2.

<sup>449</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 10; Law Council of Australia, Submission No 23 (1 July 2011) [39].

<sup>450</sup> Department of Defence, Submission No 4 (24 June 2011) 3.

<sup>451</sup> *Ibid* 4.



Defence is of the view that the availability of judicial review would disrupt the military hierarchy, the Council defers to their concerns in this area.

5.131 The ACC expressed concern about the possibility of review of statutory appointment decisions.<sup>452</sup> This is an issue that would affect most agencies. In the case of statutory appointments, they are typically made when the Minister or Cabinet selects one applicant from a range of people who applied or nominated for the job, or simply chooses a person on the basis of the Minister or Cabinet's particular preferences, and nominates that person to the Governor-General for approval of the appointment. Because statutory criteria are usually fairly limited, and there may be many suitable candidates, the decision is highly discretionary, and there may be difficulties making out any grounds for review. It is also difficult to see how useful judicial review remedies would be in relation to statutory appointments. An order quashing a decision not to appoint a person will not necessarily result in his or her eventual appointment, particularly when there are other candidates in the field. As such, judicial review of appointment decisions is likely to be ineffective. Given government concerns about potential disruptions to the appointment process due to the availability of statutory judicial review, an exemption for these decisions may be appropriate.

5.132 Examples of other statutory decisions made by the Governor-General include:

- statutory appointment and termination decisions;
- declarations of sites of historical prominence in Antarctica, naval waters and marine parks;
- dissolution of Territory assemblies;
- commissioning of Australian Federal Police officers;
- proclamations of certain overseas countries for the purposes of the *Marriage Act 1961* (Cth);
- proclamations prohibiting entry of aircraft from particular countries;
- declaration of an epidemic;
- declaration of a period of emergency for the purposes of the *Radiocommunications Act 1992*; and
- issuing Royal Commissions.

5.133 Many of these decisions are not likely to be subject to judicial review challenges. Frequently statutory decisions by the Governor-General are of a highly discretionary nature, or of very general application. As such, it may be difficult to successfully make out a ground of review in relation to the decisions. However, there is no reason why decisions such as those listed above should not be subject to statutory as well as constitutional judicial review.

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<sup>452</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 7.



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5.134 These kinds of decisions would certainly be reviewable under constitutional judicial review. However, because the discretions in both cases are quite broad, the likelihood of the courts finding a jurisdictional error has occurred is probably less than with more closely defined statutory powers. If review were available under the *ADJR Act*, the grounds of review available would be similarly limited by the broad discretion.

5.135 Ultimately, under both constitutional review and the *ADJR Act* what will be relevant is whether the Governor-General exercised the power in terms of the statute, and whether proper procedures were followed.

5.136 The Council therefore recommends that the exclusion of statutory decisions of the Governor-General be removed, to avoid decisions not being reviewable under the *ADJR Act* simply because of the identity of the decision maker. The Council considers that this is an area where there is a clear discrepancy between constitutional and statutory judicial review, which is essentially a product of historical accident.

5.137 However, the Council considers that some statutory decisions of the Governor-General should be specifically excluded in Schedule 1, most notably the decisions identified in the Department of Defence's submission to the Council, subject to ensuring transparency and fairness of the processes adopted. The Council also considers that statutory appointment processes should be excluded from review, as judicial review remedies are likely to be inappropriate and ineffective in this area, and potential disruptions to appointments through judicial review proceedings should be avoided insofar as is possible.

### Recommendation 4

With respect to the application of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to decisions of the Governor-General, the Act should be amended as follows:

- (a) decisions of the Governor-General should not be excluded from the definition of 'decision to which this Act applies' in s 3 of the Act;
- (b) decisions of the Governor-General relating to the administration of the Department of Defence and the calling out of the military forces should be listed in Schedule 1 of the Act as classes of decisions to which the Act does not apply; and
- (c) decisions of the Governor-General relating to statutory appointments and termination decisions should also be listed in Schedule 1.

## Justiciability

5.138 In Report No 32 the Council expressed the view that common law principles of 'justiciability'—meaning principles relating to what matters were suitable for judicial determination—would also apply to review under the *ADJR Act*. The Council recommended

that a statement should be included in the *ADJR Act* that matters which were not justiciable at common law would not be made justiciable by operation of the *ADJR Act*.<sup>453</sup>

5.139 The constitutional principles that control and limit the exercise of judicial power can apply to all exercises of a court's jurisdiction. While the concept of 'matter' is not expressed in the *ADJR Act* as it is in s 39B of the *Judiciary Act*, it is likely that similar justiciability issues arise under both Acts due to the separation of powers and the nature of the judicial power of the courts. On this view it is unnecessary to address the issue further or differently, and it does not need to be expressly mentioned in the *ADJR Act*.

5.140 On the other hand, the question of what is and is not appropriate for judicial determination is ultimately a matter for the courts to decide, and government agencies and ministers may want more certainty regarding particular decisions—namely, certainty that *ADJR Act* review will not 'expand' review of those decisions. In these cases it may be preferable to have a specific exemption from review in the *ADJR Act*, for example in relation to certain defence decisions, rather than relying upon general common law principles.

5.141 In the Consultation Paper, the Council sought views on whether a provision should be included in the *ADJR Act* along the lines recommended by the Council in Report No 32,<sup>454</sup> or whether guidance could be given on what decisions were justiciable—in terms of the subject matter of decisions—under the *ADJR Act*.

5.142 The concept of justiciability in the *ADJR Act* was not widely discussed in submissions. Some submissions argued that inserting the concept of justiciability in a general statutory judicial review scheme would be difficult.<sup>455</sup> The Law Council of Australia was of the view that the common law test of 'justiciability' did not apply to *ADJR Act* decisions.<sup>456</sup>

5.143 The AGD discussed whether a decision is justiciable if it has a 'close relationship to national security or was made in the conduct of international relations'.<sup>457</sup> The AGD noted that not all 'national security' decisions will be non-justiciable, for example courts have held to be reviewable some decisions affecting individual rights, such as security assessments decisions. The AGD argued that there could be difficulties in providing a 'broad-based exclusion on the basis of all national security decisions'.<sup>458</sup> The AGD also expressed concerns in articulating the 'bright line' between what is justiciable and not in relation to national security decisions.<sup>459</sup>

5.144 DIAC expressed concern with a statutory list of factors setting out the justiciability of a matter and argued that including the concept of justiciability in a general statutory review scheme is an 'unnecessarily cumbersome control mechanism'. DIAC noted that the clarity

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<sup>453</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 94.

<sup>454</sup> Ibid.

<sup>455</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 9; Law Council of Australia, Submission No 23 (1 July 2011) [35].

<sup>456</sup> Law Council of Australia, Submission No 23 (1 July 2011) [35].

<sup>457</sup> Attorney-General's Department (Cth), Submission No 21 (9 August 2011) 5.

<sup>458</sup> Ibid.

<sup>459</sup> Ibid 6.

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sought to be obtained from such a list would be outweighed by the applications to the Court challenging the interpretation of the factors.<sup>460</sup>

5.145 Billings and Cassimatis submitted that a more appropriate approach would be to include a provision stating that the *ADJR Act* operates without prejudice to principles of non-justiciability that have developed or may develop at common law'.<sup>461</sup>

5.146 The Council's view is that there is no need to refer to the common law concept of justiciability in the *ADJR Act*, nor provide explicit limits of review that seek to reflect those principles. Justiciability is not a clear or certain concept, and would introduce unnecessary confusion into the *ADJR Act*. Rather, the Council considers that specific decisions should be assessed for exclusion from the *ADJR Act* on a case by case basis, according to the principles discussed in this chapter.

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<sup>460</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 5.

<sup>461</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 9.

## 6. SEPARATE STATUTORY REVIEW SCHEMES

### SUMMARY

6.1 Some statutory and executive schemes for Commonwealth decision making have their own mechanisms for statutory appeal or review. When large volumes of decisions are made under a particular scheme, or decision making under a scheme involves unique considerations, these mechanisms can replace the need to rely on the general avenues of judicial review. Separate statutory review schemes can, however, act as yet another layer in an already complex review landscape. The Consultation Paper asked whether a uniform statutory review mechanism could be developed to replace the multiplicity of review mechanisms in Commonwealth schemes.

6.2 The Council considers that a single statutory system of judicial review could guarantee a cohesive approach to judicial review that does not exclude any part of administrative law litigation. It could make the judicial review system a simpler and more understandable legal avenue for applicants. In this chapter, the Council weighs these advantages against the costs and complications of a transition to any new regime.

6.3 The Council concludes that existing schemes are, in many cases, operating well. At an operational level, repealing the existing schemes that provide review of migration and taxation decisions would create unnecessary uncertainty and have high transaction costs. It is the Council's view that new separate statutory review schemes should only be established where there are compelling reasons to do so and, in such cases, that judicial review should not be limited.

### SHOULD THERE BE SEPARATE STATUTORY REVIEW SCHEMES?

6.1 The Council considers that a single statutory system of judicial review provides a number of advantages:

- a judicial review mechanism by which review could be sought across subject matter areas is typically easier for applicants and legal practitioners to understand;
- the development of a centralised body of administrative law litigation could reduce transaction costs for users and the operating costs of the judicial system; and
- the system could streamline the resolution of number of difficult and highly litigated concepts in particular subject matter areas.

6.2 The Council is mindful that the advantages of a single judicial review scheme must be balanced against the costs that may arise during transition to a new regime. Separate

statutory schemes may have particular procedural and legal advantages. Transition to a new legal regime would reduce certainty of outcomes for applicants, at least in the short term, and potentially result in a spike in litigation, longer cases, and increased costs.

6.3 There was some support expressed by stakeholders for the continued existence of separate statutory review schemes. The Australian Crime Commission (ACC) submitted that a separate statutory review scheme can be tailored ‘to fit the characteristics of a particular agency’s responsibilities and those who seek review of its decisions’, and promote the development of particular expertise by reviewers.<sup>462</sup> Likewise, the Department of Immigration and Citizenship (DIAC) submitted that separate statutory schemes can be necessary to address the unique concerns of particular statutory and subject matter areas.<sup>463</sup> This is discussed in relation to the separate migration jurisdiction below.

## SHOULD THE EXISTING SEPARATE STATUTORY REVIEW SCHEMES REMAIN?

6.4 While the Council considers that it is preferable for most government decisions to be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), existing schemes must be assessed on a different basis. The factors relevant to the assessment of existing schemes are their accessibility and efficiency, and the transaction costs of reform. Where there is an existing scheme which is efficient and accessible, the Council does not consider that the desirability of a single system of review is sufficient reason alone to justify high transaction costs. The Council considers the three significant existing statutory review schemes—taxation, migration, and statutory appeals to the Administrative Appeal Tribunal (AAT)—below.

### Taxation

6.5 The *ADJR Act* does not apply to tax assessment decisions, and only applies to a limited number of other taxation decisions. Part IVC of the *Taxation Administration Act 1953* (Cth) provides a statutory review mechanism for certain decisions made under Acts administered by the Commissioner for Taxation. Applicants can make ‘objections’ to decisions via an internal review process,<sup>464</sup> and subsequently apply for review in the AAT.<sup>465</sup> Appeals from the AAT on questions of law are heard in the Federal Court. Alternatively, direct appeals can be made to the Federal Court.

6.6 In its Report No 32, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act*, a majority of the Council recommended removing the *ADJR Act* exemption for taxation decisions, considering the availability of a well-established appeals mechanism

<sup>462</sup> Australian Crime Commission, Submission 5 (6 July 2011) 13.

<sup>463</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 5.

<sup>464</sup> *Taxation Administration Act 1953* (Cth) s 14ZU.

<sup>465</sup> *Ibid* s 14ZZ(a)(i).

insufficient reason for excluding further review.<sup>466</sup> A minority disagreed, emphasising the comprehensive nature of the review system, and the possibility of applicants using review under the *ADJR Act* to ‘game’ the system.<sup>467</sup>

6.7 Submissions to the current inquiry strongly supported the existing taxation review system. The Australian Taxation Office (ATO) submitted that the system of judicial review of taxation decisions was ‘long established and well developed’.<sup>468</sup> The ATO emphasised the unique policy aspects of challenging taxation decisions—for example, the Commissioner’s ability to recover amounts of taxation, despite proceedings being pending.<sup>469</sup> The ATO identified that high volumes of decisions made by the Commissioner are subject to internal review before proceeding to external administrative or judicial review.<sup>470</sup>

6.8 The Law Council of Australia also submitted that the taxation review system is working ‘perfectly well’,<sup>471</sup> specifically after the decision of the High Court in *Commissioner of Taxation v Futuris Corporation (Futuris)*.<sup>472</sup> Currently, review under s 39B of the *Judiciary Act 1903* of some taxation decisions is restricted by the presence of ‘no invalidity’ clauses, which state that a decision is not invalid because the provisions of the relevant Act have not been complied with. In *Futuris*,<sup>473</sup> the High Court held that the effect of the ‘no invalidity’ clause in s 175 of *Income Tax Assessment Act 1936* (Cth) was that a breach of the requirements of the Act would not amount to a jurisdictional error. Breaches of the Act would therefore not be subject to review under s 39B(1) of the *Judiciary Act* or s 75(v) of the *Australian Constitution*.<sup>474</sup> The use of ‘no invalidity’ clauses has ensured that, where appropriate, applicants are directed through the comprehensive merits review and appeal avenues in the taxation legislation.

6.9 The Law Council cautioned against replacing Part IVC with *ADJR Act* review, as this could reduce the scope of direct appeals to the Federal Court to determine whether an assessment is excessive on any basis.<sup>475</sup> The Law Council suggested that replacing Part IVC would expose the system to ‘gaming’ by taxpayers who may use the *ADJR Act* to seek pre-emptive determinations, which could undermine the status of the AAT.<sup>476</sup> Similarly, the ATO submitted that retaining the exclusion discourages applicants from instituting proceedings for strategic purposes, as the Court is given discretion under s 10 of the *ADJR Act* to refuse an application under that Act where other review mechanisms were available.<sup>477</sup>

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<sup>466</sup> Administrative Review Council, Report No 32, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act* (1989) 67.

<sup>467</sup> Administrative Review Council, Report No 32, *Review of the Administrative Decisions (Judicial Review) Act: the Ambit of the Act* (1989) 81.

<sup>468</sup> Australian Taxation Office, Submission No 13 (1 July 2011) 7.

<sup>469</sup> Ibid 8.

<sup>470</sup> Ibid 2.

<sup>471</sup> Law Council of Australia, Submission No 23 (1 July 2011) [36.3].

<sup>472</sup> (2008) 237 CLR 146.

<sup>473</sup> Ibid.

<sup>474</sup> *Commissioner of Taxation v Futuris Corporation* (2008) 237 CLR 146.

<sup>475</sup> Law Council of Australia, Submission No 23 (1 July 2011) [36.3]–[36.4].

<sup>476</sup> Ibid [36.4].

<sup>477</sup> Australian Taxation Office, Submission No 13 (1 July 2011) 5–8.

6.10 Despite recommendations of the Council in Report No 32, the separate taxation review scheme has been preserved by successive governments. The Council did not receive any submissions to this inquiry in support of the removal of the mechanism. Evidence presented to the Council indicated that the system was operating well, providing a comprehensive scheme for both merits review and review by the Federal Court.<sup>478</sup> Given the large volume of taxation litigation, any change to the system would have considerable impact, and the Council considers that such a change would impede rather than improve access to review. The Council therefore considers that the exclusion for certain taxation decisions in the *ADJR Act* should be retained—retaining the separate statutory system for review of taxation decisions under Part IVC of the *Taxation Administration Act 1953* (Cth).

#### Recommendation 5

The statutory system for the review of taxation decisions under Part IVC of the *Taxation Administration Act 1953* (Cth) apart from the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### Migration

6.11 Migration decisions do not, strictly speaking, have a ‘separate’ statutory review scheme in the same way as taxation decisions. Rather, constitutional review is incorporated into the *Migration Act 1958* (Cth) (*Migration Act*) through the conferral on the Federal Magistrates Court of a parallel jurisdiction to s 75(v) of the *Constitution*. Review of migration decisions is central to judicial review in Australia because of the sheer volume of litigation, and because legislative change in the jurisdiction has led to the expansion of constitutional judicial review.

6.12 In 1992, in response to a significant increase in applications for review of migration decisions in the Federal Court, a separate judicial review scheme was enacted in Part 8 of the *Migration Act* for entry decisions and refugee claims.<sup>479</sup> Part 8 was a restricted scheme, providing: mandatory merits review before judicial review could be sought; fewer grounds for review; and stricter time limits for applications. As a result, a number of cases were brought in the original jurisdiction of the High Court, significantly increasing its workload. Over time, however, the use of Part 8 was broadened by the courts through statutory interpretation.

6.13 In 2001, the introduction of a ‘privative clause’ into the *Migration Act* further limited judicial review of migration matters.<sup>480</sup> This attempt to limit judicial review failed, as the High Court subsequently allowed judicial review in relation to decisions that involve jurisdictional error.<sup>481</sup> Other amendments in 2001 introduced a bar on class actions in the Federal and High Courts, after concerns that they were being used to encourage large numbers of people

<sup>478</sup> Australian Taxation Office, Submission No 13 (1 July 2011) 5–8.

<sup>479</sup> *Migration Reform Act 1992* (Cth).

<sup>480</sup> *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).

<sup>481</sup> *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476. In *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 the High Court held that it was unconstitutional to restrict the time in which an application under s 75(v) could be brought in the High Court.



to litigate to prolong their stay in Australia.<sup>482</sup> Further amendments were made in 2002 to exclude the operation of common law rules of procedural fairness and to codify the procedure for migration decision making.<sup>483</sup>

6.14 In 2005, Part 8 of the *Migration Act* was amended to enable the Federal Magistrates Court to deal with the majority of migration matters involving judicial review.<sup>484</sup> Section 476 now provides that the ‘Federal Magistrates Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the *Constitution*’, with some exceptions. The Federal Court still has some first instance jurisdiction over certain migration decisions that are specifically set out in Part 8. *Plaintiff M61*, where judicial review was extended to non-statutory procedures carried out for the purpose of advising the Minister to make a decision under s 46A of the *Migration Act*, is an example of the broad availability of review for *Migration Act* decisions.<sup>485</sup>

6.15 The Council considers that the experiences in the migration jurisdiction are instructive. The primary lesson is that attempting to restrict or exclude judicial review entirely will not be successful. ‘Streamlining’ measures, such as the taxation ‘no invalidity’ clauses have been more successful, because they still provide for judicial oversight of decision making. In its submission to this inquiry, DIAC considered the *Migration Act* effective, because it:

- channels first instance judicial review applications to the Federal Magistrates Court;
- harmonises the jurisdictions of the Federal Magistrates Court and the High Court under s 75(v) of the *Constitution*;
- limits the jurisdiction of the Federal Court to appeals from the Federal Magistrates Court; and
- allows single judge hearings of appeals from the Federal Magistrates Court in the Federal Court.<sup>486</sup>

6.16 The second lesson the Council takes from this jurisdiction is that non-legislative measures, focusing on litigation management and assistance for applicants, can do more to improve the efficiency of the review process than legislative measures. DIAC submitted that the timely resolution of cases is the key to minimising of the risk that the system itself will encourage unmeritorious applications.<sup>487</sup> DIAC identified as key features that contribute to the successful operation of review in migration decisions:

- time limits to for the lodgement of applications;
- limitations on standing;

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<sup>482</sup> *Migration Legislation Amendment Act (No 1) 2001* (Cth).

<sup>483</sup> *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).

<sup>484</sup> *Migration Litigation Reform Act 2005* (Cth).

<sup>485</sup> *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth*, [2010] HCA 41.

<sup>486</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011).

<sup>487</sup> *Ibid* 9.

## Chapter 6: Separate Statutory Review Schemes

- a prohibition against class actions;
- court powers for summary dismissal;
- cost orders for encouraging unmeritorious litigation; and
- practitioners' certificates certifying reasonable prospects of success.<sup>488</sup>

6.17 While the Council considers that it would be possible to transpose these efficiencies to an *ADJR Act* review mechanism, their evolution is to a large part unique to the high volume of the migration jurisdiction. DIAC submitted that for any statutory scheme to include migration decisions, it would need to be aligned with the constitutional review grounds, and remain limited to jurisdictional error. If statutory review were also limited to jurisdictional error, the justification for migration decisions being excluded from the operation of the *ADJR Act* would be less clear.<sup>489</sup>

6.18 On the other hand, the Migration Review Tribunal–Refugee Review Tribunal (MRT-RRT) emphasised that ‘given the high stakes, it is appropriate that there be a facility for judicial review of Tribunal decisions’.<sup>490</sup> They submitted that the privative clause could be repealed and migration and refugee decision making be reviewed under the *ADJR Act*.<sup>491</sup> The MRT-RRT said that:

the steps taken in the attempt to restrict judicial review have had the result of returning judicial review to the complexity associated with the prerogative writs—a complexity which the reforms introduced by the ... *ADJR Act* had overcome.<sup>492</sup>

6.19 In the longer term, the Council considers that the Government should consider bringing migration back into a general statutory review scheme. The Council acknowledges that judicial review is an essential safety net, enabling the correction of the legal error that will occur from time to time in high volume merits review decision making. Any reintegration would require careful consideration of procedure to ensure timely resolution of cases.

6.20 In the short to medium term, however, the argument for bringing migration litigation back under the *ADJR Act* is less compelling. *Plaintiff M61*,<sup>493</sup> and the large numbers of review applications generally, suggest that the separate system has not restricted the availability of constitutional judicial review, which provides remedies for a number of legal errors. The Council also notes applicants' relatively low success rates on appeal. Because of the significant volume of litigation in this area, any change to the review system is likely to be accompanied by the high transaction costs of a temporary increase in litigation as applicants test whether the change has expanded the grounds available for challenging a decision.

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<sup>488</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 9.

<sup>489</sup> Ibid 5.

<sup>490</sup> Migration Review Tribunal–Refugee Review Tribunal, Submission No 10 (5 July 2011) [3].

<sup>491</sup> Ibid [7]. See also Denis O'Brien, ‘Merits Review Update—The challenges in bringing the tribunals within mainstream administrative law’ (CPD Immigration Law Conference, Melbourne, 11–12 March 2011) <<http://www.mrt-rrt.gov.au/Speeches-and-Publications/Speeches-and-Publications/default.aspx>>.

<sup>492</sup> Migration Review Tribunal–Refugee Review Tribunal, Submission No 10 (5 July 2011) [4].

<sup>493</sup> *Plaintiff M61 v Commonwealth* (2010) 243 CLR 319.

6.21 The Council has also considered submissions on the continued utility of retaining a procedural code for the MRT-RRT. The MRT-RRT submitted that the procedural codes enabled by s 424A of the *Migration Act* is the subject of significant litigation without enhancing the quality of decision making by the Tribunals.<sup>494</sup> In matters remitted to the MRT-RRT with s 424A as the principal ground of contention, courts have found that tribunal action would have satisfied common law procedural fairness, but amounted to jurisdictional error in falling short of the requirements of a procedural code.<sup>495</sup> Procedural codes are considered further in Chapter 7, and the Council considers that DIAC may wish to consider the utility of the procedural code in this context. The Council is mindful that the extraordinary amount of litigation and administrative work associated with the code means that the scale of this issue is large. Overall, the Council notes that endeavours to achieve compliance with the code have not necessarily enhanced the fairness of the review process, at considerable cost to efficiency and increased litigation.

## Statutory appeals from the AAT

6.22 Section 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*) provides that a party to a merits review proceeding may appeal to the Federal Court from any decision of the AAT, on a question of law. A number of submissions to the Council argued that this appears to duplicate the statutory review rights under s 5 of the *ADJR Act*. In practice, however, s 44 remains the primary means of seeking review of AAT decisions.

6.23 In its 1997 Report, *Appeals from the Administrative Appeals Tribunal to the Federal Court* (Report No 41), the Council acknowledged the considerable overlap between the scope of appeals to the Federal Court under s 44 and judicial review under the *ADJR Act*. The Council considered arguments for removing the limited appeal right under s 44, concluding that s 44 appeal rights should be preserved.<sup>496</sup>

6.24 Submissions to this inquiry presented divergent views. The Law Council of Australia submitted that there were strong arguments in favour of removing the limited right of appeal in s 44, so that AAT decisions would be subject to judicial review under the *ADJR Act* or s 39B of the *Judiciary Act*.<sup>497</sup> However, the AAT is of the view that the appeals mechanism in s 44 of the *AAT Act* has a number of benefits—most notably, the user benefits of a clear appeals mechanism, and procedural and cost benefits when compared to judicial review applications.<sup>498</sup> The ATO also strongly supported retaining s 44, as it plays a role in the system for review of taxation decisions.<sup>499</sup>

6.25 The Council considers that the risk of duplication is mitigated by the demarcated functions of s 44 appeals and judicial review under the *ADJR Act* and s 39B of the

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<sup>494</sup> Migration Review Tribunal–Refugee Review Tribunal, Submission No 10 (5 July 2011) [11].

<sup>495</sup> *Le v MLAC* [2010] FMCA 460, [12].

<sup>496</sup> Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, Report No 41 (1997).

<sup>497</sup> Law Council of Australia, Submission No 23 (1 July 2011) [143].

<sup>498</sup> Administrative Appeals Tribunal, Submission No 12 (24 June 2011).

<sup>499</sup> Australian Taxation Office, Submission No 13 (1 July 2011) 3–4.

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*Judiciary Act*. Currently, appeals under s 44 are made on ‘questions of law’, which, in practice, limits judicial review applications in the Federal Court under the *ADJR Act* and s 39B to ‘procedural matters’. In Report No 41, the Council noted that, rather than duplicating the s 44 appeals function, judicial review is of conduct that falls outside the scope of the ‘decision’ itself.<sup>500</sup> The AAT also submitted that, distinct from appeals under s 44, review applications under the *ADJR Act* and s 39B can consider interlocutory decisions of the Tribunal—that is, decisions other than final decisions.

6.26 The Law Council suggested that, because AAT decisions can be reviewed under the *ADJR Act*, where review is not confined to questions of law, ‘providing a more limited right of appeal serves little practical purpose’. The Law Council of Australia suggested that it is common practice to seek review under the *ADJR Act* as well as seeking leave to appeal under s 44, providing as an example *Geographical Indications Committee v O’Connor*,<sup>501</sup> in which the Court found jurisdiction under s 39B of the *Judiciary Act*, but not under s 44 of the *AAT Act* or under the *ADJR Act*.<sup>502</sup>

6.27 The Council considers that the statistics available, discussed in Chapter 3, indicate that s 44 is used as a primary means of applying for review much more often than other mechanisms: in 2010–11 there were 98 s 44 appeals, as opposed to 23 other judicial review applications. Most of the other judicial review applications were related to migration matters, where s 44 appeals are not always available. In addition—while there is no clear prohibition against applicants using both avenues and statistics do not reflect applications in the alternative—the Federal Court has held that s 44 should be the primary means of seeking review of AAT decisions.<sup>503</sup> As submitted by the AAT, s 44 ‘serves as a clear and explicit statement within the *AAT Act* that the Tribunal is subject to judicial review’, and that this ‘supports the principles of efficiency and openness in the administrative law system’.<sup>504</sup>

6.28 The Council considers *Geographical Indications*<sup>505</sup> an example of a review application properly made under s 39B, rather than an illustration of the parallel operation of the statutory mechanisms. Because there was no final decision or determination by the AAT before the review application was made, the Federal Court had no jurisdiction to hear an appeal under s 44.<sup>506</sup> This illustrates what the Council considers to be a unique benefit of the s 44 mechanism—the necessity of focusing appeal applications on the final AAT decision, and discouraging applicants involving the Federal Court in judicial review proceedings before the AAT makes a decision.

6.29 In the Council’s view, the risk of duplication would also be mitigated by the ability of the Federal Court to refuse applications for review under s 39B and the *ADJR Act* where there is insufficient basis for review beyond appeals under s 44 of the *AAT Act*. In reverse,

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<sup>500</sup> Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, Report No 41 (1997) 21.

<sup>501</sup> (2000) 64 ALD 325.

<sup>502</sup> Law Council of Australia, Submission No 23 (1 July 2011) [145].

<sup>503</sup> *Osland v Secretary to the Department of Justice* (2010) 84 ALJR 528 [21].

<sup>504</sup> Administrative Appeals Tribunal, Submission No 12 (24 June 2011) 2.

<sup>505</sup> *Geographical Indications Committee v O’Connor* (2000) 32 AAR 169.

<sup>506</sup> *Ibid.*

the Tribunal has the ability under s 45 of the *AAT Act* to refer what it considers questions of law to the Federal Court. This can be done of its own motion, or at the request of a party while a proceeding is underway.

6.30 The Council has considered the opposing argument that removing the statutory appeals mechanism in s 44 would eliminate the difficulty of determining what is a ‘question of law’ under the *AAT Act*. The Federal Court in *Tuite v Administrative Appeals Tribunal* articulated the potential breadth of the definition:

The words ‘question of law’ in s 44 encompass matters concerning not only the interpretation of a Federal enactment or the enunciation of the principle of the common law or equity, but also the breach of any duty which the Tribunal was bound by law to perform and the failure of which to perform may lead to the setting aside of the decision. The words ‘question of law’ encompass grounds enunciated in s 5 of the *ADJR Act*.<sup>507</sup>

6.31 A number of submissions argued that the technical nature of a ‘question of law’ for the purposes of framing the jurisdiction causes confusion, particularly for self-represented litigants and legal practitioners inexperienced in administrative law. The Law Council of Australia considered it ‘notoriously difficult’ to frame ‘questions of law’, discussing the strict approach of the Federal Court, requiring appeal applications to be framed as ‘pure’ questions of law.<sup>508</sup> The Law Council submitted that ‘this requirement detracts from the underlying question of determining the legality of the decision under review, and appears to promote form over substance’.<sup>509</sup>

6.32 In consultations, the possibility was raised of replacing the statutory requirement for appeals on a ‘question of law’ with appeals on an ‘error of law’, but the Council considers that framing applications in terms of an error of law would be problematic.<sup>510</sup> At present, an appeal notice will identify a question of law which the AAT may have answered incorrectly, and the Federal Court hears the appeal to determine whether an error of law has been made. The Council considers that framing applications on questions of law has advantages—it draws attention to the distinction between review of the merits of a case and legal error, and discourages applicants from seeking to challenge findings of fact.

6.33 Overall, the Council concludes that the procedural advantages of retaining s 44 outweigh the arguments for its removal or revision. The AAT submitted that s 44 provides a clear and explicit mechanism for the review of Tribunal decisions by the Federal Court.<sup>511</sup> The Council notes that s 44 appeals are improved by the ability of the Federal Court to be

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<sup>507</sup> 40 FCR 483 at 484.

<sup>508</sup> The Law Council, at [144], refers to *Birdseye v Australian Securities and Investments Commission* [2003] FCAFC 232, [9]–[18]. See also *Weeks v Commissioner of Taxation* [2012] FCA 542.

<sup>509</sup> Law Council of Australia, Submission No 23 (1 July 2011) [144].

<sup>510</sup> Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court*, Report No 41 (1997). The High Court has also made clear that the scope of a right of appeal on the ground of error of law from a tribunal decision is a limited one that does not grant the court jurisdiction to review the entire matter argued in the tribunal. The appellate jurisdiction covers only as much as is impugned for error of law: *Osland v Secretary to the Department of Justice* (2010) 84 ALJR 528, [20] French CJ, Gummow and Bell JJ [78] (Hayne and Kiefel JJ).

<sup>511</sup> Administrative Appeals Tribunal, Submission No 12 (24 June 2011).

constituted as the Full Court in appropriate cases,<sup>512</sup> and the requirement that the Tribunal provide ‘all documents that were before the Tribunal in connexion with the proceeding’ to the Court within 21 days.<sup>513</sup> Further, unlike in judicial review applications, the Tribunal is not required to be a party to s 44 appeals from its decisions, and this can reduce transactions costs for parties and for government. Appeals without the AAT as a party also arguably preserve the impartiality of the Tribunal, and recognise the unique nature of the AAT as the generalist Commonwealth merits review tribunal.<sup>514</sup>

6.34 The submission of the AAT noted that s 483 of the *Migration Act* excludes the operation of s 44 for most migration decisions made by the Tribunal. This means that those decisions are subject to a different system of review in either the Federal Court or the Federal Magistrates Court.<sup>515</sup> The AAT submitted that this can lead to confusion for appellants about the correct forum for lodging migration appeals. It also means that the benefits of s 44 appeals described above are not available for appeals from migration decisions of the Tribunal. The AAT is of the view that s 44 should be the sole mechanism for review of Tribunal decisions. DIAC, on the other hand, does not support any change to the existing arrangements.<sup>516</sup> Given the unique considerations of *Migration Act* decisions, the Council does not propose to recommend changes at this time.

#### Recommendation 6

The avenue for appeal from a decision of the Administrative Appeals Tribunal to the Federal Court on a question of law under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) should be retained.

### SHOULD THERE BE NEW SEPARATE STATUTORY REVIEW SCHEMES?

6.35 Where a separate statutory review system is not currently established, the considerations are different from those applied to existing schemes. The Council’s view is that such schemes will rarely be justified. The Council considers that there should be a framework for assessing future proposals for separate statutory schemes to ensure that: core administrative law values are maintained; there is no diminution of review avenues; and the reasons for establishing a separate scheme of review are compelling. Particular issues arising for individual agencies or sectors may be able to be addressed by procedural modifications, for example to streamline general review processes, rather than by the establishment of a completely new system. The Council notes that as constitutional judicial review for jurisdictional error cannot be excluded, establishing a separate statutory scheme of review will have high transaction costs while making little difference to the availability of review.

<sup>512</sup> *AAT Act* s 44(3)

<sup>513</sup> *Ibid* s 46(1).

<sup>514</sup> Administrative Appeals Tribunal, Submission No 12 (24 June 2011).

<sup>515</sup> AAT decisions on review under s 500 of the *Migration Act* are subject to review by the Federal Court, while decisions on review under s 136 of the *Migration Act* are subject to review by the Federal Magistrates Court: ss 476 and 476A of the *Migration Act*. See, eg, *Bhullar v MLAC* [201] FCA 1337; *Mikasa v MLAC* [2012] FCA 321.

<sup>516</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 10.



6.36 Where the Government proposes to establish a new separate statutory scheme to operate alongside or in place of review under the *ADJR Act*, the Council considers that there should be compelling reasons for the establishment of such a scheme—such as the need for a streamlined process involving both merits and judicial review, such as in the taxation system. New statutory schemes should not attempt to restrict the grounds of review or remedies available under the *ADJR Act*. The Council notes that procedural measures can be implemented in relation to particular kinds of matters without establishing an entirely separate scheme of review. The Council considers that further fragmentation of the judicial review system is undesirable, and that new separate statutory schemes will rarely be justified.

#### **Recommendation 7**

A new avenue for judicial review that operates alongside or in place of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should not be established unless there are compelling reasons, and only after consultation with the Attorney-General and the Council.

### **Australian Crime Commission**

6.37 In submissions the ACC argued for a statutory review scheme to be established under the *Australian Crime Commission Act 2002* (Cth), which would include:

- an expedited procedure with statutory timelines subject to extension only in genuinely special circumstances;
- a requirement for summary dismissal of unmeritorious cases or components of cases; and
- provision for the courts to access and take account of criminal intelligence material that is subject to public interest immunity, or, protection under the statutory regime in the ACC Act, without making it available to the applicant.<sup>517</sup>

6.38 The ACC acknowledged that allowing the courts to take account of publicly unavailable criminal intelligence material would fall short of the requirements of natural justice. However the ACC submitted that this was justified by the sensitivities of its operations.<sup>518</sup> The ACC noted that there already tends to be specialisation of judges of the Federal Court in relation to review of ACC decisions.<sup>519</sup>

6.39 The Council considers that a new separate scheme in the case of the ACC is not justified. What are purported to be special characteristics in the case—the sensitive nature of cases, delaying tactics and unmeritorious cases—are also present in other jurisdictions. The relationship of the ACC’s administrative decisions to criminal investigations does raise issues of concern, however, particularly in relation to the effectiveness of prosecutions. The Council considers that removing the decisions from the ambit of *ADJR Act* review would not

<sup>517</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 3.

<sup>518</sup> Ibid.

<sup>519</sup> Ibid 13.



## *Chapter 6: Separate Statutory Review Schemes*

limit the availability of constitutional judicial review either under s 39B of the *Judiciary Act* or s 75(v) of the *Constitution*. These are not circumstances in which review is appropriately restricted to the High Court. The ACC's issues may be best dealt with through non-statutory procedural methods, for example discussions with the court regarding the expediting of certain matters.

## 7. GROUNDS OF REVIEW

### Summary

7.1 Judicial review principles set standards for the lawfulness of government decisions. The grounds of review define the standards for lawful decision making, but also reflect principles of ‘fairness’ and ‘rationality’ for administrative action. For example, the rules of natural justice or procedural fairness set out certain procedures which must be followed in order to afford a person a fair hearing in particular cases. Other grounds of judicial review require a decision maker to follow rational reasoning processes—for example, the requirement to consider relevant considerations and not take into account irrelevant considerations when making a decision. In this way, the grounds of review align with the underlying principles of the administrative law system.

7.2 The first issue with regard to grounds of review is whether they should be listed and codified, as in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), or whether it is preferable to rely on courts to develop the grounds in the course of judicial review. In the Australian context, this raises the question of whether it is appropriate to rely on the concept of ‘jurisdictional error’ to capture the grounds of judicial review, as is the case in the constitutional judicial review jurisdiction (under s 75(v) of the *Australian Constitution* and s 39B of the *Judiciary Act 1903*).

7.3 The Consultation Paper sought views on the best form for a codified list of grounds. Should it be general or specific, and accompanied or replaced by general principles? What form should the ‘catch all’ grounds take—grounds designed to accommodate developments in the constitutional judicial review jurisdiction; and what grounds should be included?

7.4 The Consultation Paper also considered the issue of statutory codes of procedure and their relationship with the general concept of procedural fairness.

7.5 Submissions to the Council broadly supported a codified list of grounds, and only a few made suggestions for amendments to the grounds. The Council concluded that the codified list of grounds in the *ADJR Act* remains a valuable guide for legal practitioners and government decision makers. The Council does not recommend adding any new grounds to the list, but rather suggests some minor amendments to the existing grounds.

### APPROACH TO THE GROUNDS OF REVIEW

7.6 A question the Council asked in the Consultation Paper was whether there should be a codified list of grounds at all, or whether it is preferable to rely on the courts’ development of grounds. As Mason J observed in *Kioa v West*, ‘the statutory grounds of review enumerated in s 5(1) are not new—they are a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law’.<sup>520</sup> However, since the

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<sup>520</sup> (1985) 159 CLR 550, 576.

## Chapter 7: Grounds of Review

time the *ADJR Act* grounds were developed, the High Court has placed increasing emphasis on the fact that writs available in the original jurisdiction of the High Court (prohibition and mandamus) only issue where there has been a jurisdictional error.<sup>521</sup>

7.7 Review under the *ADJR Act* extends beyond the requirement for a jurisdictional error in three respects. First, review under the *ADJR Act* is available for any error of law, whether or not that error is jurisdictional and whether or not the error appears on the face of the record.<sup>522</sup> Second, review is available where the decision maker has based the decision on a particular fact, and that fact did not exist—the ‘no evidence’ ground.<sup>523</sup> This factual error does not have to be a jurisdictional fact or an error of law.<sup>524</sup> Third, review is available where the procedures required by law were not observed.<sup>525</sup> This ground appears not to be confined to jurisdictional errors,<sup>526</sup> unlike the common law.<sup>527</sup> Given the evolving concept of jurisdictional error, it is unclear to what extent these grounds go beyond the grounds for constitutional judicial review.

7.8 Emeritus Professor Mark Aronson argued that repealing the codified grounds of review ‘would be the worst of all possible worlds’ as it would result in relying on jurisdictional error. He noted that there is ‘widespread angst and confusion’ over the term, though he believes the ‘angst to be greatly over-wrought and the confusion to be quite unnecessary’.<sup>528</sup> The Council agrees that jurisdictional error is a complex concept and reliance solely on jurisdictional error as the basis for review of decisions may be confusing and therefore impede access to review. As noted above, the grounds in the *ADJR Act* cover the key questions which need to be addressed in considering whether a jurisdictional error has been made, both in terms of the statutory scheme and implied limitations on the exercise of the statutory power. While the concept of jurisdictional error may be well understood by expert legal practitioners, particularly barristers, for non-experts the list of grounds in the *ADJR Act* continues to provide a useful tool for framing judicial review applications. Removing the grounds may also create more confusion for practitioners.

7.9 The grounds of review under the *ADJR Act* have been criticised for a number of reasons. Aronson, for example, has suggested that, while the list approach states the grounds, a person has always needed knowledge of the common law in order to understand them.<sup>529</sup> Kirby J has expressed the view that ‘to some extent the development of the common law of

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<sup>521</sup> *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531. The constitution injunction may not be so restricted. In *Plaintiff S157* the Gaudron, McHugh, Gummow, Kirby and Hayne JJ stated that ‘given that prohibition and mandamus are available only for jurisdictional error, it may be that injunctive relief is available on grounds that are wider than those that result in relief by way of prohibition and mandamus’: (2003) 211 CLR 476, 508.

<sup>522</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(f).

<sup>523</sup> *Ibid* ss 5(2)(h) and 5(3)(b).

<sup>524</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009).

<sup>525</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(b).

<sup>526</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 352–53.

<sup>527</sup> *Ibid* 354; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>528</sup> Mark Aronson, Submission No 1 (13 May 2011) 2–3.

<sup>529</sup> Mark Aronson ‘Is the ADJR Act Hampering the Development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202.

judicial review in Australia was retarded by the enactment of the *ADJR Act* in 1977.<sup>530</sup> Stephen Gageler SC has noted that the grounds do not have any organising principles, which may make development of the law more difficult.<sup>531</sup> However, it is significant to note that both Aronson and Kirby J ultimately supported a codified list of grounds, with some modifications.

7.10 It is also true that through the use of the concept of ‘jurisdictional error’, courts conducting review in the constitutional judicial review jurisdiction focus on the particular statutory scheme rather than general principles. Nonetheless, grounds such as breach of procedural fairness, failing to take into account a relevant consideration, taking into account an irrelevant consideration and other more procedural grounds are almost always implied into the statute. A number of *ADJR Act* grounds address the core concepts of a ‘jurisdictional error’ relating to the statutory scheme: no jurisdiction to make the decision; the decision was not authorised by the enactment in pursuance of which it was purported to be made; and improper exercise of the power conferred by the enactment. These grounds are extremely broad, and depend upon an interpretation of the particular statutory scheme.

7.11 The submissions to the Council overwhelmingly supported some form of codification.<sup>532</sup> Drs Billings and Cassimatis stated that codified grounds have ‘enhanced accessibility to review, providing both transparency and flexibility to adapt to the evolving administrative state’.<sup>533</sup> The Law Council of Australia noted that the ‘clear list’ of potential grounds has an ‘educative effect by setting out a relatively comprehensive summary of the common law’.<sup>534</sup> The Department of Immigration and Citizenship (DIAC) submitted that simplified and codified grounds of review could assist people to better understand the judicial review process and facilitate them to make better informed decisions.<sup>535</sup> The Australian Crime Commission (ACC) pointed to the usefulness of a codified list of grounds for decision makers, noting that grounds provided ‘a structured approach to the assessment process’.<sup>536</sup> Should the list of grounds not be comprehensive, the ACC submitted it would be necessary to supplement the list with principles to guide decision makers to consider all relevant factors. The Council agrees that codified grounds are more transparent and accessible, and that grounds can play a role in explaining judicial review to legal practitioners and other applicants.

7.12 While there may be some attraction in the idea of leaving the articulation of grounds to the courts—noting the important role the courts play in developing existing grounds—relying solely on case law would almost certainly make framing an application more difficult for practitioners and applicants who were not familiar with administrative law.

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<sup>530</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, 94.

<sup>531</sup> Stephen Gageler, ‘The Underpinning of Judicial Review of Administrative Action: Common Law of Constitution’ (2000) 28 *Federal Law Review* 217.

<sup>532</sup> Law Council of Australia, Submission No 23 (1 July 2011) [52]; Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 11; Australian Crime Commission, Submission No 5 (6 July 2011) 8; Mark Aronson, Submission No 1 (13 May 2011) 2; Greg Weeks, Submission No 8 (1 July 2011) 5; Migration Review Tribunal–Refugee Review Tribunal, Submission No 10 (5 July 2011) [10].

<sup>533</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 11.

<sup>534</sup> Law Council of Australia, Submission No 23 (1 July 2011) [52].

<sup>535</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 6.

<sup>536</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 8.

## Chapter 7: Grounds of Review

7.13 The Council considers that a codified list of grounds should be retained. The codified grounds do continue to play an educative role. They have the potential to educate decision makers about proper decision-making practices, and applicants about their legal rights. Codified grounds are more transparent and accessible than relying solely on principles set out in judicial decisions.

### GENERAL OR SPECIFIC LIST OF GROUNDS

7.14 The Consultation Paper invited comment on whether a less comprehensive and prescriptive list of grounds may be more flexible and adaptable. In Canada, the general power of federal courts to issue judicial review remedies is granted by s 18(1) of the *Federal Courts Act*, RSC 1985.

7.15 Section 18.1(4) lists the grounds upon which the court may grant relief—if it is satisfied that the federal board, commission or other tribunal:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it;
- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.

7.16 The Consultation Paper suggested that this more basic approach to codifying the grounds may allow room for judicial development of the grounds and address some of the criticisms of codification, while retaining the benefits.

7.17 The Law Council of Australia did not support a more general list of grounds and argued there is no reason why the *ADJR Act* cannot take into consideration developments in the common law.<sup>537</sup> The Law Council also argued that the general grounds proposed in the Consultation Paper were ‘too generic and vague’; would likely be sources of complexity and unpredictability; and distract from more pertinent issues with the *ADJR Act*.<sup>538</sup> The Law Council recommended that the wording of the grounds of review in the *ADJR Act* could be simplified, noting however that there is an absence of general knowledge about the right to judicial review in the community, which cannot be remedied by reforming the grounds.

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<sup>537</sup> Law Council of Australia, Submission No 23 (1 July 2011) [57].

<sup>538</sup> Ibid [58].

7.18 Aronson argued that adopting the Canadian approach of a generalised statement of grounds would be neither simple nor straightforward.<sup>539</sup> Aronson submitted that, despite their drawbacks and criticisms of the grounds in the *ADJR Act*, it is beneficial that practitioners are familiar with the grounds.

7.19 The only stakeholder to support the Canadian approach of generalised grounds was NSW Young Lawyers.<sup>540</sup> They agreed with the criticisms made of the codified grounds of review contained in the *ADJR Act*, discussed in the Consultation Paper.

7.20 The Council considers that many of the benefits that flow from having codified grounds flow from their specificity, to the extent that they have an educative effect and allow applicants to frame an application for review, and can—to some extent—be understood without an extensive knowledge of judicial decision making. The Canadian list does not include some key grounds of review, such as the considerations grounds, and thus still requires an applicant to look to the common law to find key grounds of review. It is therefore unclear that a more general list would retain the benefits of a codified list of grounds—it may simply create more confusion. The Council therefore does not support replacing the specifically listed grounds in the *ADJR Act* with a general list of grounds.

## GENERAL PRINCIPLES

7.21 The Consultation Paper canvassed the case for some general principles to give direction for the particularised grounds.<sup>541</sup> There are examples in other Commonwealth legislation of objects clauses that provide overarching principles—such as the *Freedom of Information Act 1982* (Cth) (*FOI Act*), which has stated objects of providing public access to government held information through publication requirements and rights to access documents.<sup>542</sup>

7.22 Including general principles to give direction for particularised grounds was not widely discussed in the submissions. Billings and Cassimatis supported the inclusion of a ‘meta-principles’ clause in a codified scheme, arguing that ‘broad statements of principle linking constitutional concepts ... to the role and operation of the courts would ... be uncontentious, serve a basic educative function and, be unlikely to hamper the development of administrative law’.<sup>543</sup>

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<sup>539</sup> Mark Aronson, Submission No 1 (13 May 2011) 3.

<sup>540</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 9.

<sup>541</sup> Stephen Gageler, ‘The Underpinnings of Judicial Review of Administrative Action: Common law or Constitution?’ (2000) 28 *Federal Law Review*, 303.

<sup>542</sup> *Freedom of Information Act 1982* (Cth) s 3. The objects clause in s 3 was amended by the *Freedom of Information Reform (Amendment) Act 2010* (Cth). These objects are intended to promote Australia’s representative democracy. They replace the Act’s previous objects, which were directed at balancing the competing interests of openness and privacy and were criticised by commentators for conveying a mixed message: see, eg, *News Corporation Ltd v National Companies and Securities Corporation* (1984) 1 FLR 64, 66; *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) FCR 111, 115; Mark Aronson ‘Is the ADJR Act Hampering the Development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202.

<sup>543</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 11.

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7.23 NSW Young Lawyers also supported the use of general principles and noted it would be consistent with the inclusion of objects provisions in legislation.<sup>544</sup> They argued such an approach is consistent with the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*<sup>545</sup> and s 15AA of the *Acts Interpretation Act 1901* (Cth).

7.24 One of the arguments the Council considered was whether general principles of fairness, lawfulness and rationality, as adapted by the UK courts, could be used in Australia as a way of influencing the behaviour of decision makers to make the initial decision according to law. By moving the focus away from specific errors in decision making, more general principles could assist decision makers to focus on the way they make decisions, rather than focusing on technical procedural requirements. This may improve decision making and reduce the need for review.

7.25 The Council considers that the problem with this approach is that general principles often do not assist decision makers. A decision maker may consider that a particular procedure followed was ‘rational’ and ‘fair’, but a court could easily disagree with the interpretation of these very broad terms. It is not clear that articulating principles would in fact assist decision makers with interpretation of the requirements of more specific judicial review grounds.

7.26 Another argument is that if general principles were listed alongside a list of grounds similar to those in the *ADJR Act*, the principles might help the courts to develop the more general grounds in the *ADJR Act* that allow for the development of the law: ‘otherwise contrary to law’<sup>546</sup> and ‘any other exercise of a power in a way that constitutes abuse of the power’.<sup>547</sup> General principles may also overcome criticisms such as Kirby J’s that the codification of grounds is hampering the development of administrative law.

7.27 However, it is unclear whether listed principles would make this any more likely, given that there is significant judicial articulation of the principles underlying judicial review. Aronson has suggested that objects clauses are often of little practical utility if all they do is list the competing factors which need to be balanced in particular cases.<sup>548</sup> In the case of judicial review principles, there is an important gap between the general understanding of concepts like fairness, and what it means in terms of legal requirements for decision makers.

7.28 The Law Council of Australia argued that ‘the precise legal status of such principles, how they would bind decision makers and whether (and in what circumstances) they would provide a basis for granting relief also seem to be likely sources of complexity and unpredictability’.<sup>549</sup> As discussed in the Consultation Paper, complexity can be a barrier to accessing the legal system. In addition, the creation of general principles could increase

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<sup>544</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 9.

<sup>545</sup> (1998) 194 CLR 355.

<sup>546</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(j) and 6(1)(j).

<sup>547</sup> *Ibid* ss 5(2)(j) and 6(2)(j).

<sup>548</sup> Mark Aronson ‘Is the ADJR Act Hampering the Development of Australian Administrative Law’ (2004) 15 *Public Law Review* 202, 218.

<sup>549</sup> Law Council of Australia, Submission No 23 (1 July 2011) [58].



complexity for decision makers, by adding to the issues they must consider in terms of what legal standards they need to meet when making decisions.

7.29 The principles could be stated in a manner which clearly indicates they are not binding, and are there to assist the interpretation of the grounds. This may assist with the Law Council's concerns. On the other hand, it may not be possible to articulate guidance on how a ground should be applied in a workable manner.

7.30 Overall, the Council considers that including an overarching statement of objectives or principles in the *ADJR Act* is likely to create more uncertainty about the grounds of review, and that it is unlikely to have any real benefit for decision makers. The Council considers that providing guidance to decision makers is important, and that the current list of codified grounds provides a good starting point.

## **‘CATCH ALL’ GROUNDS**

7.31 The *ADJR Act* potentially allows for the adoption of developments in the constitutional judicial review jurisdiction by the inclusion of two ‘catch-all’ grounds of review, enabling review on the grounds that decisions are ‘otherwise contrary to law’<sup>550</sup> or amount to ‘an exercise of power in a way that constitutes an abuse of the power’.<sup>551</sup> It has been suggested that these grounds acknowledge the capacity of new grounds of review to be developed as a matter of law.<sup>552</sup> However, at the same time, the almost total lack of applications which have sought to use these provisions has led to the suggestion that these grounds of review are ‘dead letters’.<sup>553</sup>

7.32 There are only a few cases where the ‘otherwise contrary to law’ ground has been considered by the courts.<sup>554</sup> In some cases, this ground appears to have been used where another ground was also applicable, such as unreasonableness,<sup>555</sup> or that the respondent's decisions, conduct and actions were not authorised by the enactment in pursuance of which they were purported to be made.<sup>556</sup> In the majority of cases it appears that the applicant merely asserted that the decision was ‘otherwise contrary to law’ and the court did not examine what might be encompassed by that term.<sup>557</sup> In *Re Minister of Immigration, Local Government and Ethnic Affairs v Veselko Kurtovic*, the Federal Court considered the issue of whether substantive unfairness could be considered ‘otherwise contrary to law’ and found

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<sup>550</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(j) and 6(1)(j).

<sup>551</sup> *Ibid* ss 5(2)(j) and 6(2)(j).

<sup>552</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 123.

<sup>553</sup> Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32 *Melbourne University Law Review* 470, 518.

<sup>554</sup> See, eg, *Scott v Human Rights and Equal Opportunity Commission* (includes Corrigendum dated 16 December 2010) [2010] FCA 1323 (2 December 2010); *Re Minister of Immigration, Local Government and Ethnic Affairs v Veselko Kurtovic* (Unreported, Federal Court of Australia, Neaves, Ryan And Gummow JJ, 7 February 1990).

<sup>555</sup> *Manikantan v Centrelink* [2008] FMCA 716 (2 June 2008) [394].

<sup>556</sup> *Humane Society International Inc v Minister for the Environment & Heritage* (2003) 126 FCR 205, [28].

<sup>557</sup> See *Pharmacy Guild of Australia v Australian Community Pharmacy Authority* (Unreported, Federal Court of Australia, Branson J, 20 November 1996).

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that it could not.<sup>558</sup> The implicit point of this case is that it requires a principle to be recognised in Australian law before it may be invoked under the ground of ‘otherwise contrary to law’. In other words, the ground itself does not establish new principles or grounds of review but appears to allow principles of law already recognised by the courts to be pursued under the *ADJR Act* by use of this ground.

7.33 The courts have not been willing to consider that ‘otherwise contrary to law’ includes breaches of private law, such as breach of confidence,<sup>559</sup> breach of contract, estoppel, and misleading and deceptive conduct.<sup>560</sup> As discussed below, there have not been many new grounds of constitutional judicial review, and those new grounds have only emerged in recent times. It seems likely that the current provision in the *ADJR Act* would be sufficient to incorporate those new grounds.

7.34 If the apparent purpose of these grounds is to enable the *ADJR Act* to accommodate any grounds of judicial review that may arise as a matter of law, the grounds could be amended more clearly to acknowledge that possibility. The Consultation Paper suggested that they might instead be replaced by a single ground that enables review under the *ADJR Act* on any ground of review that may be available at common law.

7.35 The Law Council of Australia submitted that although the grounds of ‘otherwise contrary to law’ and ‘abuse of power’ may not be widely used, that is not a reason to repeal them.<sup>561</sup> Some stakeholders acknowledged that although codified grounds can be inflexible, this can be combated by including broad grounds which enable judicial review of anything that is available at common law.<sup>562</sup> The Australian Network of Environmental Defenders Offices (ANEDO) argued that without broadening the catch-all grounds, codified grounds could impede the development of the law and ‘prevent incorporation of arguments from other jurisdictions that may not fit within the codified grounds.’<sup>563</sup>

7.36 The Council considers that the lack of successful applications of the ‘otherwise contrary to law’ ground is largely due to two factors: the lack of applications made under that ground and the limited number of developments in constitutional judicial review that do not fit under one of the other grounds in ss 5 and 6. There is therefore no evidence that the ground as it exists is particularly problematic and it provides an avenue through which developments in the common law may be incorporated or recognised in the *ADJR Act*.

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<sup>558</sup> *Re Minister of Immigration, Local Government and Ethnic Affairs v Veselko Kurtovic* (Unreported, Federal Court of Australia, Neaves, Ryan And Gummow JJ, 7 February 1990) [55].

<sup>559</sup> *Gray v Australian Securities & Investments Commission* (2002) 122 FCR 12.

<sup>560</sup> *Moran Hospitals Pty Ltd v Conor King & Anor* (Unreported, Federal Court of Australia, Beaumont J, 3 September 1997).

<sup>561</sup> Law Council of Australia, Submission No 23 (1 July 2011) [55].

<sup>562</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 4; Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 11.

<sup>563</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 4.

## ADDITIONAL GROUNDS

7.37 The Consultation Paper considered two potential new grounds of review: ‘proportionality’ and ‘serious administrative injustice’. During the course of consultations, another potential new ground was raised: ‘serious illogicality or irrationality’.

7.38 Proportionality is a ground currently not recognised in Australian law. ‘Serious illogicality’ has been recognised by the High Court in two cases: *Minister for Immigration and Multicultural Affairs, Re Ex parte Applicant S20/2002*<sup>564</sup> and *Minister for Immigration and Citizenship v SZMDS (SZMDS)*.<sup>565</sup> ‘Serious administrative injustice’ was a ground suggested by Kirby J,<sup>566</sup> but it has not been adopted by the High Court.

### *Serious illogicality or irrationality*

7.39 Martin Smith suggests that ‘serious illogicality or irrationality’ is now a ground available at common law.<sup>567</sup> It should be noted, however, that there is some inconsistency in the cases in terms of precisely what the ground entails. Four out of the five judges in *SZMDS* did consider ‘serious illogicality or irrationality’ to be a ground of review.<sup>568</sup> However, two different approaches were taken by the majority judges as to the interpretation of what the ground required, with Gummow ACJ and Kiefel J differing from Crennan and Bell JJ on outcome.

7.40 ‘Serious illogicality or irrationality’ was only recognised in *SZMDS* as applying to jurisdictional facts,<sup>569</sup> following the conclusions of Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB (SLGB)*.<sup>570</sup> Gummow ACJ and Kiefel J characterised the test for illogicality as making ‘a critical finding by inference not supported on logical grounds’.<sup>571</sup> Crennan and Bell JJ, on the other hand, considered that the test was whether there was room for reasonable minds to differ on a particular jurisdictional fact—there would only be serious irrationality if there were no room to differ.<sup>572</sup> There is also a question of how ‘serious illogicality or irrationality’ differs from *Wednesbury* unreasonableness, and whether it adds anything to that ground.

7.41 If ‘serious illogicality or irrationality’ is established as a ground which demonstrates jurisdictional error, then the *ADJR Act* would most likely allow for applications to be made on the basis that the error meant that the decision maker did not have the jurisdiction to make the decision or that the decision was otherwise contrary to law. However, one of the advantages of the *ADJR Act* grounds is their educative effect. If there is a ground recognised

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<sup>564</sup> (2003) 198 ALR 59.

<sup>565</sup> (2010) 240 CLR 611.

<sup>566</sup> *Re Minister for Immigration and Multicultural affairs: Ex parte Applicant S20/2002* (2003) 198 ALR 59, 96, 98.

<sup>567</sup> Martin Smith, “‘According to law, and not humour’: Illogicality and administrative decision-making” (2011) 19 *Australian Journal of Administrative Law* 33.

<sup>568</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 615–628 (Gummow ACJ and Kiefel J) 635–650 (Crennan and Bell JJ).

<sup>569</sup> *Ibid.*

<sup>570</sup> (2004) 207 ALR 12.

<sup>571</sup> *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 628.

<sup>572</sup> *Ibid.*

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at common law and the *ADJR Act* grounds are being revised, it is in the original spirit of the Act to recognise new common law grounds—and to do so expressly. While the content of the ground is currently uncertain, including it in the *ADJR Act* may assist in its development. On the other hand, since the ambit of the ground is still uncertain, it may be preferable to leave it to develop in the constitutional judicial review jurisdiction without giving it clear statutory recognition at this stage, relying instead on the existing grounds in the *ADJR Act*.

### *Proportionality*

7.42 Proportionality is a ground of review that originated in civil law countries in Europe, but has made its way into the common law of the UK.<sup>573</sup> However, proportionality is not regarded as a separate ground for review in the Australian context,<sup>574</sup> and most Australian courts and commentators regard it, as Michael Taggart remarked, as a ‘bridge too far’,<sup>575</sup> largely because of its perceived incursion into the merits of a particular case.

7.43 In the UK, proportionality is established when executive action interferes with a recognised right, interest or freedom in a manner that is disproportionate to the objective to be achieved.<sup>576</sup> It is a ground often applied in the UK in cases involving human rights, supported by the *Human Rights Act 1998* (UK). Taggart has argued that it owes much of its ‘much-admired analytic and structuring qualities’ as a methodology to an enumerated list of rights.<sup>577</sup>

7.44 Australia does not have a statutory list of human rights, meaning that proportionality would not have the same certainty in terms of what rights, interests or freedoms would give rise to a consideration of the proportionality of an executive action. The Law Council of Australia commented, for example, that:

The reason for the UK ‘expansion’ of judicial review is due to peculiar factors—UK’s geopolitical positioning in Europe; the *Human Rights Act* and the absence of a written Constitution which incorporates a strict separation of powers. Due to the nature of Australia’s written Constitution it might not be desirable (or even possible) to create rights of review that use a principle such as proportionality.<sup>578</sup>

7.45 The main argument in support of proportionality is that the courts currently perform a similar exercise using existing grounds of review, to the extent that they may apply a varying intensity of review where more significant rights or interests are in question—for example, the content of procedural fairness may alter depending on the decision-making context.

7.46 Separate questions could arise about the meaning of proportionality. There seems to be no single definition of proportionality from the jurisdictions which have engaged the

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<sup>573</sup> *R v Shayler* [2003] 1 AC 247; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

<sup>574</sup> See Sir Anthony Mason, ‘The Scope of Judicial Review’ (2001) 31 *ALAL Forum* 21.

<sup>575</sup> Michael Taggart, ‘Australian Exceptionalism in Judicial Review’ (2008) 36 *Federal Law Review* 1, 24.

<sup>576</sup> See Robin Creyke and John McMillan, *Control of Government Action. Text, Cases and Commentary* (LexisNexis, 2nd ed, 2009) 993.

<sup>577</sup> Michael Taggart, ‘Australian Exceptionalism in Judicial Review’ (2008) 36 *Federal Law Review* 1, 25.

<sup>578</sup> Law Council of Australia, Submission No 23 (1 July 2011) [54].

concept. Adoption of this ground would require consideration of whether it should be defined or simply listed. The latter would be consistent with the *ADJR Act* approach to other grounds and would enable a statutory ground of proportionality to incorporate common law evolution of the concept.

*Serious administrative injustice*

7.47 Kirby J suggested that the grounds of judicial review may need to develop in order for judicial review to correct ‘clear injustices’ or ‘serious administrative injustice’.<sup>579</sup> His Honour’s mention of ‘fundamental flaws of logic and reasoning’<sup>580</sup> indicates a focus on grave errors. This suggestion echoes many English cases that have allowed relief for ‘conspicuous unfairness’.<sup>581</sup> An additional ground based on serious administrative injustice is in the nature of a residual common law ground to be available to correct administrative error with serious consequences for the individual.

7.48 The English law concept of conspicuous or substantive unfairness has not been adopted as a ground of review in Australia because it is seen as straying too closely to the exercise of merits review by the courts.<sup>582</sup> Questions of degree—whether an injustice was ‘serious’—are not seen as appropriate for judicial determination in Australia. It is likely that if such a ground existed, the courts would frequently be called upon to determine whether a particular decision was ‘unjust’, and to what degree. This kind of inquiry is likely to blur the distinction between executive and judicial functions, and is likely to be seen as inappropriate by government administrators.

7.49 The Law Council of Australia made a general comment on the addition of new grounds, referring to Kirby J’s suggestion of including grounds to deal with ‘serious administrative injustice’ or ‘fundamental flaws of logic or reasoning’, asking:

But should changes to the grounds be made to capture such ‘errors’? How would they be worded and how would straying into merits review be avoided? Could the *Wednesbury* unreasonableness ground be loosened? But if so how again without facing criticism that the judiciary is straying into the executive field?<sup>583</sup>

7.50 There are also other remedies and accountability mechanisms—such as claims under the CDDA and other discretionary compensation schemes,<sup>584</sup> or complaints to the Ombudsman—which are available to people who have suffered an administrative injustice that cannot be remedied by the courts.

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<sup>579</sup> *Re Minister for Immigration and Multicultural affairs: Ex parte Applicant S20/2002* (2003) 198 ALR 59, 96, 98.

<sup>580</sup> *Ibid* 98.

<sup>581</sup> See Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32 *Melbourne University Law Review* 470, 487–89.

<sup>582</sup> The application of these recent English concepts within Australia’s constitutional framework were doubted by the High Court in *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 10 (Gleeson CJ) 23 (McHugh and Gummow JJ, Callinan J agreeing on this point). The wider difficulties that these English concepts would encounter in Australia are explained in M Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 32 *Melbourne University Law Review* 470.

<sup>583</sup> Law Council of Australia, Submission No 23 (1 July 2011) [56].

<sup>584</sup> See Chapter 2.

## No need for additional ‘catch all’ grounds

7.51 The Council considers that there is no need to add additional grounds to the current list in ss 5 and 6 of the *ADJR Act*. The ground of ‘serious illogicality’ has not yet been fully defined or developed by the High Court, and the ‘catch-all’ ground in s 5(j) of the *ADJR Act* is likely to incorporate the new ground as ‘otherwise contrary to law’. The Council considers that both ‘proportionality’ and ‘serious administrative injustice’ are grounds that raise issues about the line between merits and judicial review, and that other avenues are open to people who have suffered from serious maladministration to make complaints or seek compensation.

## AMENDMENT OF THE EXISTING GROUNDS OF REVIEW?

7.52 Emeritus Professor Aronson, Greg Weeks, and Drs Billings and Cassimatis all suggested in submissions to the Council that some reform of the specific grounds was necessary. This part considers these suggestions, considering the work of Professor Cane and Associate Professor McDonald, among others. The Council agrees that it is appropriate to make these minor amendments in order to clarify the grounds and ensure they provide clear guidance to applicants and legal professionals.

*Section 5(1)(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed*

7.53 Aronson commented that this provision is too wide, as it could extend to immaterial procedural errors.<sup>585</sup> He recommends restricting the provision to ‘procedural errors that did affect or might have materially affected the result’.<sup>586</sup> The reason for altering the ground in this way is that it would better reflect how the ground is applied by the courts.

7.54 The Council agrees that this provision is, on its face, extremely broad. The potential breadth of the provision is an area of concern, as on one reading, the provision could imply that the failure to comply with any statutory step, however small, could invalidate a decision. However, attempting to capture the approach of the courts in a statutory provision is problematic. The High Court’s approach to procedural errors in *Project Blue Sky Inc v Australian Broadcasting Authority* (*Project Blue Sky*)<sup>587</sup> was to look at whether the Parliament intended for a failure to follow the procedure to result in invalidity. The courts also have discretion as to whether or not to issue an order of review, and the severity of the breach of procedure could be a factor taken into account.

7.55 The Council considers that, since there is no evidence that the courts are applying this ground in an overly broad manner, there is not a strong case for a legislative amendment. The Council suggests that an explanatory note could be inserted following the ground to make it clear that not all breaches of a procedural requirement will necessarily result in the issue of an order of review.

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<sup>585</sup> Mark Aronson, Submission No 1 (13 May 2011) 3.

<sup>586</sup> Ibid.

<sup>587</sup> (1998) 194 CLR 355.



*Section 5(2)(a) taking an irrelevant consideration into account*

7.56 Aronson submitted that it might be clearer to refer to an irrelevant and forbidden consideration, rather than to taking an irrelevant consideration into account.<sup>588</sup> However, the Council was concerned that this wording might not accurately reflect the common law, and create confusion rather than clarify the ground.

7.57 Aronson also suggested an alternative wording: ‘taking into account a consideration in breach of the enactment in pursuance of which the decision was purported to be made’.<sup>589</sup> This wording reflects the manner in which ‘irrelevant considerations’ are determined in constitutional review cases, where the relevance of a consideration is determined with reference to the statute. It would therefore strengthen the relationship between the *ADJR Act* grounds and the concept of jurisdictional error.

7.58 The Council considers that the approach to these grounds is already clear to practitioners, and that amending the statute might suggest that the courts should change their approach to the grounds. The Council does not support an amendment to this ground.

*Section 5(2)(b) failing to take a relevant consideration into account in the exercise of a power*

7.59 Aronson recommends that it might be clearer to refer to a relevant and mandatory consideration, to better reflect the common law requirement.<sup>590</sup> The notion of ‘mandatory’ is also elastic and may not therefore clarify this ground. The Council had similar issues with this proposal as with the proposed amendment to s 5(2)(a). Once again, after further consultation, Professor Aronson suggested that s 5(2)(b) could be reworded as follows: ‘failing to take a relevant consideration into account in breach of the enactment in pursuance of which the decision was purported to be made’.<sup>591</sup>

7.60 As with the irrelevant considerations ground, the Council considers that the approach to these grounds is already clear to practitioners, and that amending the statute might suggest that the courts should change their approach to the grounds. The Council does not support an amendment to this ground.

*Section 5(2)(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case.*

7.61 Aronson and Weeks both raised a number of interesting points in relation to this ground. They both noted that it is common for high volume decision making to be structured by non-binding rules or policies issued by the decision-making organisation.<sup>592</sup> Weeks pointed out that, while there is an interest in ensuring that the merits of a particular

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<sup>588</sup> Mark Aronson, Submission No 1 (13 May 2011) 4.

<sup>589</sup> Ibid.

<sup>590</sup> Ibid.

<sup>591</sup> Ibid.

<sup>592</sup> Ibid; Greg Weeks, Submission No 8 (1 July 2011) 5.



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case are considered, ‘there is a competing consideration of consistency, particularly where so much regulation is done through the means of soft law’.<sup>593</sup>

7.62 The importance of agency guidelines are now recognised in the *FOI Act* publication scheme, where agencies are required to publish guidelines used to make decisions.<sup>594</sup>

7.63 Weeks stated that the increase in the use of soft law and policy to govern regulation has led to a recognition that:

published soft law and policies must mean *something*; in other words, that those who use them as a regulatory tool ought not lightly to be able to apply any other standard. On the other hand, soft law cannot be applied as though it were hard law. The problem, in essence, is not simply regulation with soft law but the fact that the soft law applied asymmetrically: it operates as *de facto* hard law on those who are being regulated but is decidedly soft in its effect on the regulators.<sup>595</sup>

7.64 Both Aronson and Weeks noted that, in the UK, the Supreme Court has recognised that there are situations where guidelines are needed, and that the government cannot lawfully depart from the terms of published guidelines.<sup>596</sup>

7.65 Aronson and Weeks did not recommend going down the UK path. However, they both considered that the need to weigh the benefits of an unfettered exercise of discretion against the benefits of consistency needs to be recognised, as signalled by Brennan J in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*.<sup>597</sup> They both recommended a reformulation of s 5(2)(f) along the lines of ‘applying a rule or policy that unlawfully purports to narrow the breadth or content of an applicable discretionary power’.

7.66 The Council considers that the law in this area is unclear. However, an amendment dealing with rules and policies that sought to ‘unlawfully ... narrow’ a discretionary power might be seen to imply that rules and policies that purport to widen or extend discretionary power are permissible. An alternative amendment to this ground would be to address rules or policies that ‘narrow or expand’ or ‘unlawfully alter’ the breadth of a discretionary power.

7.67 Overall, the Council considers that the courts are currently dealing with these issues, and that while an amendment to this ground might be considered in the future, at this stage there is not a major problem with the application of the provision by the courts.

### *Sections 5(1)(b) and 5(3)—No evidence ground*

7.68 Aronson, Billings and Cassimatis recommended revision of the ‘no evidence’ ground in paragraph (5)(1)(h) and subsection 5(3) of the *ADJR Act*.<sup>598</sup> Billings and Cassimatis suggested that there is conflicting authority on the operation of the provision, and that it

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<sup>593</sup> Greg Weeks, Submission No 8 (1 July 2011) 5.

<sup>594</sup> *Freedom of Information Act 1982* (Cth) part II.

<sup>595</sup> Greg Weeks, Submission No 8 (1 July 2011) 5.

<sup>596</sup> *Ibid*; Mark Aronson, Submission No 1 (13 May 2011) 4.

<sup>597</sup> (1979) 2 ALD 634.

<sup>598</sup> Mark Aronson, Submission No 1 (13 May 2011) 5; Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 11.

would be of benefit to clarify it—namely, to clarify when an evidential/factual error should be classified as a legal error.<sup>599</sup>

7.69 Aronson suggested that the requirement that there be no material at all to justify the decision means that the ground as it currently stands does not add anything to ‘error of law’ and suggests two possible ways to reform the provision:

- reframe the ‘no evidence’ ground, so that the conditions in s 5(3) establish that the ground in s 5(1)(h) is made out, leaving open the possibility that other conditions could also satisfy the ground; or
- reframe the ground to focus on whether the decision that a matter of fact was established or existed was so unreasonable that no reasonable decision maker would have made it.<sup>600</sup>

7.70 Another possible reform might be to align this ground closer to its counterpart under constitutional judicial review. However, the precise boundaries of the ground as a ground for constitutional judicial review are unclear, and it would be difficult to draft such an amendment.

7.71 In *Australian Broadcasting Tribunal v Bond*, the High Court stated that ‘it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law’.<sup>601</sup> However, the case law is unclear on what findings of fact the no evidence ground applies to. The Full Federal Court has said that the fact must be a ‘critical step in [the decision maker’s] ultimate conclusion’.<sup>602</sup> In *SGLB, Gummow and Hayne JJ* tied the constitutional judicial review no evidence ground to the concept of ‘jurisdictional fact’, referring to the need for a fact to be ‘a precondition to the exercise of jurisdiction’ for the no evidence ground to establish a jurisdictional error.<sup>603</sup>

7.72 This link between the ‘no evidence’ ground and jurisdictional fact appears to be an unsatisfactory approach in the case of the *ADJR Act* ground. An error in relation to a jurisdictional fact would be a ground of review under s 5(1)(c)—the statutory no evidence ground appears to go somewhat further than this.

7.73 Cane and McDonald note that the *ADJR Act* formulation of the ‘no evidence’ rule is:

one of the few instances where the drafters of the *ADJR Act* intentionally departed from the common law. Unfortunately, however, the detailed description of the no evidence ground in s 5(3) has not resulted in a clearer understanding of the statutory form of the no evidence ground.<sup>604</sup>

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<sup>599</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 11.

<sup>600</sup> Mark Aronson, Submission No 1 (13 May 2011) 4.

<sup>601</sup> (1990) 170 CLR 321, 355.

<sup>602</sup> *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALD 402, 407.

<sup>603</sup> (2004) 207 ALR 12, 21 [39].

<sup>604</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law* (Oxford University Press, 2008) 174.

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7.74 It is not clear, however, whether the reason for the limited case law on this ground is simply because the provision is clear enough that people know that they will not be able to prove the ground and do not litigate. Generally, the cases where an error of fact will amount to an error of law are limited, and it may simply be that such cases do not often arise.

7.75 The question of which errors of fact amount to an error of law is addressed by s 5(3), though aspects of the distinction could perhaps be clearer. The Council considers that s 5(3) of the *ADJR Act* appears to be an attempt to narrow the range of facts or matters to which the ground applies by specifying particular errors of fact. Paragraph 5(3)(a) requires that the decision maker is *required by law* to only make the decision if satisfied of particular facts or matters. This appears to mean that paragraph (a) is intended to cover legislative powers that require a fact be found or an opinion reached. On the other hand, s 5(3)(b) refers only to findings of fact. Paragraph (a) is therefore linked to legislative requirements that a fact be found or an opinion reached. If that is not the case, review seems appropriate because it allows the terms of the statute to be scrutinised by the court. The same is not true with paragraph (b) because that does not have the phrase “required by law”. Paragraph (b) presumably refers to facts which may not have been expressly required by the provision, but the finding of which was crucial to the decision. If this rationale was extended beyond findings of fact to the formation of an opinion (as seems possible under paragraph (a)) it would move close to merits review, which would be inappropriate.

7.76 Cane and McDonald note that it is not clear whether the requirements of s 5(3) are necessary but not sufficient to establish the no evidence ground, or if s 5(3) can be taken as establishing the content of the no evidence ground for the purposes of the *ADJR Act*.<sup>605</sup> They also identify issues with:

- the ‘reasonably satisfied’ standard in paragraph (a), to the extent to which it has not been subject to extensive discussion by the court;
- the lack of clarity about what amounts to a ‘particular matter’ ‘required by law’ for the purposes of paragraph (a)—does this mean the matter must be a jurisdictional fact or a critical finding, or is some other standard applied; and
- the strict manner in which ‘particular fact’ referred to in paragraph (b) has been interpreted by the court—for example, the High Court has held that fact will not be critical to the decision if the same decision would have been reached regardless.<sup>606</sup>

7.77 In relation to the first of these matters, this appears to be a question that the Court will consider on a case by case basis. The question of the standard by which a ‘particular matter’ or a ‘particular fact’ should be assessed could perhaps be clearer on the face of the provision.

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<sup>605</sup> Peter Cane and Leighton McDonald, *Principles of Administrative Law* (Oxford University Press, 2008) 174.  
<sup>606</sup> *Minister for Immigration and Multicultural Affairs v Rajamanikam* (2002) 210 CLR 222.

7.78 The Council therefore supports Aronson’s suggestion that the conditions in s 5(3) are sufficient to establish the ‘no evidence’ ground, but are not exhaustive. The Council also considers that s 5(3) should be amended in the following manner:

- that paragraph (b) should require the decision to be based on the existence of facts critical to the final decision, clarifying in what manner the decision must be ‘based on’ the particular facts; and
- that in the case of both paragraphs (a) and (b) it is clarified that a ‘fact’ can be a past, present or future fact.

7.79 The issue of whether other facts exist which may have justified the decision is ultimately a remedial issue, and relevant to the court’s discretion under s 16 of the *ADJR Act*. The Council does not consider that specific direction needs to be given in the statute on this issue.

#### **Recommendation 8**

The Council recommends that the current list of grounds for review in ss 5 and 7 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained in its current form, with one amendment to sections 5(3) and 6(3).

The Council recommends that subsections 5(3) and 6(3), which set out the requirements which must be met if the ‘no evidence’ ground in paragraphs 5(1)(h) or 6(1)(h) is to be made out, are amended so that:

- (a) it is clear that the conditions in s 5(3) are sufficient to establish the ‘no evidence’ ground, but are not exhaustive;
- (b) in paragraph (b) it is clear that the decision must be based on the existence of facts critical to the final decision; and
- (c) in the case of both paragraphs (a) and (b) it is clarified that a ‘fact’ can be a past, present or future fact.

## **STATUTORY CODES OF PROCEDURE**

7.80 It is common for statutes to include procedural steps for decision making, mirroring the common law obligation to accord natural justice. However a statutory code of procedure will not by itself exclude that common law obligation.<sup>607</sup> The High Court has made clear that natural justice is a fundamental principle that may only be displaced by legislation with

<sup>607</sup> *Re Minister for Immigration and Multicultural Affairs; Ex parte Miab* (2001) 206 CLR 57, 84–85 (Gaudron J) 95–98 (McHugh J) 111–115 (Kirby J) 73–75 (Gleeson CJ and Hayne J).

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‘irresistible clearness’.<sup>608</sup> This indicates the rigorous scrutiny to which the High Court subjects legislative attempts to limit or exclude the requirements of natural justice.

7.81 Procedural directions in legislation are in many ways desirable as they give a clear framework for decision makers. Setting out what the legislature considers to be a fair process for making particular decisions can increase certainty and ensure a consistent approach to decision making, ensuring equity and fairness.

7.82 Issues arise where the legislative procedures are seen as exhaustively addressing the requirements of procedural fairness and decision makers fail to take into account the circumstances of particular cases. In these situations courts may find there has been a breach of procedural fairness even where procedures have been complied with. In other circumstances, the courts may find that legislative procedures have not been complied with, but otherwise be satisfied that there has been compliance with common law procedural fairness requirements and overall a fair process.

7.83 In the migration jurisdiction, a Code of Procedure was introduced in 1994 in part 7 of the *Migration Act 1958* (Cth) (*Migration Act*), to codify the principles of procedural fairness, provide certainty and identify the procedural obligations which decision makers must meet. However, while such procedures can provide an indication of what might be regarded as procedural fairness, it would not preclude the courts’ consideration of whether procedural fairness has been accorded. As the decision in *Minister for Immigration and Citizenship v SZIZO* indicates, a failure to comply with a statutory procedure will not automatically give rise to a breach of procedural fairness if there have been no adverse consequences for the individual.<sup>609</sup> This will depend upon whether the provision is merely designed to ‘facilitate’ a fair hearing.<sup>610</sup>

7.84 In the Consultation Paper, the Council sought views on whether codes of procedure are desirable and in what circumstances, and whether policy directions could be provided to government on when such codes are appropriate.

7.85 One problem identified by stakeholders was their inflexibility. NSW Young Lawyers, for example, submitted that there should not be any codes of procedural fairness as they do not have the flexibility required to develop with the changes in society. They argued that the common law and *ADJR Act* should apply in determining whether procedural fairness has been breached, and supported the inclusion of codes of procedure, but argued they should not constitute a code of procedural fairness.<sup>611</sup> Billings and Cassimatis submitted that introducing a statutory code of procedure is ‘ill advised and highly problematic in practice’.<sup>612</sup> They argued that, in the migration context, the statutory code of procedure has been ‘counterproductive and failed to assist tribunals deliver substantial justice in a timely and cost-

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<sup>608</sup> *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>609</sup> (2009) 238 CLR 627.

<sup>610</sup> *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, 639–40. See also discussion of ‘practical injustice’ in *Lam* above in Chapter 3.

<sup>611</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 9.

<sup>612</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 12.

effective manner.<sup>613</sup> They submitted that the common law is more flexible and importantly, not every procedural error will result in invalidity, as is the case in the migration context, if it had no substantive impact on the outcome.<sup>614</sup>

7.86 Although the ACC submitted that a code of procedure ‘may assist in structuring the decision-making process’,<sup>615</sup> they argued that it must be made clear that compliance with the code is not always enough and there is a ‘broader objective’ to be achieved.<sup>616</sup> The ACC noted however that most decisions they make which are reviewed do not attract procedural fairness obligations.

7.87 The Attorney-General’s Department (AGD) submitted that procedural fairness obligations will depend on the facts and circumstances in each case and it would be challenging to ‘capture this balancing act’ in a statutory code of procedure.<sup>617</sup> The AGD expressed concern that developing statutory codes of procedure may risk creating codes that are not appropriate in the national security context or may in fact lessen procedural fairness that would have otherwise been provided.

7.88 The code of procedure in the *Migration Act* was raised as a particular issue. DIAC submitted that the code of procedure that applies in the migration context could not be removed without being replaced by some form of guidance for decision makers. They noted that although there has been extensive litigation over the code, the interpretation is now ‘fairly settled’.<sup>618</sup> They submitted that the code ‘was intended to eliminate the legal uncertainties that flow from the non-codified common law principles of natural justice while retaining fair, efficient and legally certain decision making procedures.’<sup>619</sup> Conversely, the MRT-RRT submitted that the code of procedure in the migration context ‘leads to unexpected interpretation, uncertainty and extensive litigation’.<sup>620</sup> They argued that statutory codes of procedure ‘cannot replicate the adaptiveness of common law procedural fairness’.<sup>621</sup> Victoria Legal Aid also expressed concern with the anomalies created by the codes of procedure in the *Migration Act* as they tend ‘to create technical arguments about the interpretation of the code’.<sup>622</sup>

7.89 There may be reasons why legislators wish to codify completely the natural justice hearing rule. For example, where there are approval processes and where large numbers of submissions are received from different stakeholders, it would be difficult to assess particular requirements in terms of notice and hearing for each group or individual making a submission. Therefore, legislation may set out a particular form of notice and time for

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<sup>613</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 12.

<sup>614</sup> Ibid.

<sup>615</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 8.

<sup>616</sup> Ibid.

<sup>617</sup> Attorney-General’s Department (Cth), Submission No 21 (9 August 2011) 7.

<sup>618</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 7.

<sup>619</sup> Ibid.

<sup>620</sup> Migration Review Tribunal–Refugee Review Tribunal, Submission No 10 (5 July 2011) [11].

<sup>621</sup> Ibid.

<sup>622</sup> Victoria Legal Aid, Submission No 14 (7 July 2011) 4.



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submissions to be made. Uncertainty about procedural fairness requirements in such cases could cause uncertainty about decisions which will affect a large number of groups.

7.90 On the other hand, courts may be reluctant to accept that procedural fairness has been completely codified. In addition, being too prescriptive can cause problems if fairness in a particular case appears to require a different process.

7.91 The Council considers that, while setting out procedural requirements in legislation can assist decision makers to make valid decisions, such codes can also leave little room for discretion on the part of decision makers, and may sometimes result in unfairness to applicants. For example, as noted in Chapter 6, the Council considers that endeavours to achieve compliance with the code have not necessarily enhanced the fairness of the review process, at considerable cost to efficiency and increased litigation. The Council has previously provided some guidance on how procedural fairness requirements can be addressed in legislation in Report No 46, *The Scope of Judicial Review*. This advice is not necessarily presented currently in a form which is useful for policy makers developing legislation on when and what kind of legislative provision for procedural fairness is appropriate, and the Council considers that this should be revised.

### **Recommendation 9**

The Administrative Review Council should develop clear guidance for policy makers on when statutory codes of procedure, or procedural steps in legislation, are appropriate, and what form they should take.

## 8. RIGHT TO SEEK REVIEW

### SUMMARY

8.1 ‘Standing’ refers to the right to commence legal proceedings. In a public law context, ‘standing’ describes the interest regarded by the courts as sufficient to maintain public law proceedings. A theme which emerged from submissions to the Council on standing is that the view of judicial review as a ‘public’ law proceeding—as distinct from a ‘private’ law proceeding—gives rise to a number of questions about appropriate standing rules. Standing is fundamental to access to justice, because it allows parties with an interest in proceedings to access the court while preventing court resources being occupied by parties with no real interest in the outcome of a dispute. The rules related to standing are complex and still evolving.<sup>623</sup>

8.2 Standing is not the only barrier to access to review. Costs and other issues also play a role. This chapter considers only the limited issue of standing rules.

8.3 The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) currently gives standing to a person aggrieved by a decision to which the Act applies.<sup>624</sup> The Council has concluded that this test does not provide sufficiently clear standing for representative organisations with an interest in a decision to make an application for review under the *ADJR Act*. The Council therefore recommends that the *ADJR Act* be amended to align with the standing test in s 27 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*), in particular to give standing to an organisation or association of persons, whether incorporated or not, if the decision relates to a matter included in the objects or purposes of the organisation or association.

### STANDING AND THE PUBLIC INTEREST

8.4 Roger Douglas’ empirical analysis of standing suggests that, while it is only at issue in two or three cases a year, the cases often have profound implications for sizeable sections of the community who have shared interests with the plaintiff.<sup>625</sup> Furthermore, Douglas argues that ‘standing decisions have implications whose importance is disproportionate to their frequency’.<sup>626</sup> There are also an unknown number of people and organisations that are dissuaded from commencing judicial review cases due to current standing principles.

8.5 Judicial review may have implications for sections of the community or the public as a whole (especially where the decision relates to a broad issue of policy). This means that

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<sup>623</sup> See *Bateman’s Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 263, 279–80; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 599–600, 611, 627–8, 652–3, 670.

<sup>624</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5–7.

<sup>625</sup> Roger Douglas, ‘Use of standing rules 1980–2006’ (2006) 14 *Australian Journal of Administrative Law* 22, 34–35.

<sup>626</sup> *Ibid.*

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standing rules sometimes need to balance the public's interest in certain proceedings with the ability of an individual to protect his or her private interests.

8.6 To apply for review under the *ADJR Act*, a person must be one 'who is aggrieved by' a decision, conduct or failure to make a decision.<sup>627</sup> The issue is whether, given the public interest in government decision making, this test is too narrow.

8.7 Representative organisations, as opposed to individuals, may have an interest in the proceeding, but have trouble establishing standing. Associate Professor Matthew Groves has observed that, 'although standing rules have relaxed in recent times, representative associations often still struggle to establish standing'.<sup>628</sup> Groves argues that the requirement of the current judicial review standing rules—for a complainant to show a special interest or be aggrieved by a decision—does not equate with even the strong views or commitments of representative groups, and these restrictive elements make it difficult for representative groups to challenge government decisions.<sup>629</sup> He considers this has led to uneven results in environmental cases.<sup>630</sup> The problem arises because of the common law principle that the objects of a particular representative organisation are not alone sufficient to demonstrate an interest in proceedings which can give an organisation standing.<sup>631</sup> Groves notes that cases on the standing of representative associations have been inconsistent,<sup>632</sup> and at this stage the matter remains unresolved by the High Court.

8.8 The Consultation Paper considered two models for expanding standing requirements in the *ADJR Act*:

- a model based on s 27(2) of the *AAT Act*, which extends standing for representative organisations if the decision relates to a matter included in the objects or purposes of the organisation or association; and
- open standing—a standing test that allows any person to commence 'public' proceedings, unless existing legislation provides otherwise or the commencement of an action would unreasonably interfere with a private interest.

8.9 The major difference between these two models is that the first focuses on standing for representative organisations only, with no major changes to the standing test for individuals. The second model is based on the idea that any individual has some kind of interest in a judicial review proceeding and should be able to make an application.

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<sup>627</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5–7.

<sup>628</sup> Matthew Groves, 'Should the *Administrative Law Act 1978* (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451, 470.

<sup>629</sup> Matthew Groves, 'Standing and related matters' (2010) 59 *Admin Review* 62, 62.

<sup>630</sup> *Ibid.*

<sup>631</sup> See, eg, *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493.

<sup>632</sup> Matthew Groves, 'Should the *Administrative Law Act 1978* (Vic) be Repealed?' (2010) 34 *Melbourne University Law Review* 451, 470.

8.10 The rules of standing in public interest matters were the subject of detailed analysis by the Australian Law Reform Commission (ALRC) in 1985 and 1996.<sup>633</sup> In its 1996 report, the ALRC recommended broadening the rules of standing, and recommended open standing in cases that have a public element so as to ensure accountability and compliance to the law in decision making. The ALRC argued that '[t]he primary function of any standing test must be to ensure that public law proceedings are able to be commenced when it is in the public interest to do so', and the test for standing should be broader than that where private interests are involved (and the players' interests are clear).<sup>634</sup> The ALRC's proposed standing test would allow any person to commence 'public' proceedings unless existing legislation provides otherwise, or the commencement of an action would unreasonably interfere with a private interest. This would be regulated by a single statutory framework giving the courts a general power to allow intervention on terms and conditions that it specifies.

8.11 There are two main arguments for an open standing approach in judicial review proceedings. First, because all members of the public have an interest in the Government acting properly and according to law, any member of the public should be able to call the government to account for its administrative actions. Secondly, arguments about standing in litigation waste time and resources, which would be better spent resolving the substantive issues in the case. The Public Interest Advocacy Centre (PIAC) submitted to the Council that changes to the standing rules are necessary to facilitate public interest litigation, which in their opinion 'has the capacity to create systemic change for large groups of people without the need for each person to bring a separate legal claim'.<sup>635</sup>

8.12 The Consultation Paper put forward a proposal that the test for standing for representative organisations in s 27(2) of the *AAT Act* could be adopted in judicial review proceedings. Section 27(2) provides that organisations are 'taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association'.<sup>636</sup>

8.13 Groves argues that the *AAT Act* approach has a number of advantages:

- first, simplicity—the provision does not require applicant organisations to put forward evidence beyond their objectives, allowing the Tribunal to focus on substantive issues;
- secondly, it aligns the approach to standing for organisations with the broader approach to standing taken for individuals;
- thirdly, it would prevent different rules developing with regards to organisations with interests in different areas—for example, environmental litigation;

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<sup>633</sup> Australian Law Reform Commission, *Standing in public interest litigation*, Report No 27 (1985); Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78 (1996).

<sup>634</sup> Australian Law Reform Commission, *Beyond the door-keeper: Standing to sue for public remedies*, Report No 78 (1996) 38.

<sup>635</sup> Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 5.

<sup>636</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 27(2).

## Chapter 8: Right to Seek Review

- fourthly, the provision focuses on the ‘substantive activities’ of the body rather than whether it is incorporated or not; and
- finally, the *AAT Act* provision does not give standing to organisations whose objects were formulated after the proceeding commenced, preventing abuse of process.<sup>637</sup>

8.14 There was broad support in submissions for the adoption of the *AAT Act* test for standing for representative organisations.<sup>638</sup> Drs Peter Billings and Anthony Cassimatis submitted that the common law rules of standing are unnecessarily complex. They argued that uncertainty in relation to standing ‘undermines the public law values that judicial review is intended to serve’.<sup>639</sup> They argued the ‘person affected’ formula contained in the *AAT Act* is preferred as it is ‘broad enough to allow access to the courts for those whose rights, interests or legitimate expectations are impacted on by public decision making’.<sup>640</sup> They also noted that the standing requirement in s 27(2) of the *AAT Act* appears to work well for environmental legislation.

8.15 The Australian Network of Environmental Defenders Offices (ANEDO) and PIAC both preferred broader standing tests, but considered the *AAT Act* test to be a viable alternative. ANEDO argued that the standing requirements for judicial review should be broad in order to facilitate ‘appropriate scrutiny of decisions affecting individuals and the wider community’.<sup>641</sup> They expressed concern that cases such as *Australian Conservation Foundation Inc v Commonwealth*<sup>642</sup> and *North Coast Environmental Council v Minister for Resources*<sup>643</sup> have demonstrated the courts are inconsistent in applying the current test for standing. They also noted the differences in standing requirements between different pieces of legislation: the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) contains a broad standing provision to apply for an injunction,<sup>644</sup> while the *National Greenhouse and Energy Reporting Act 2007* (Cth) does not.

8.16 ANEDO preferred the broad standing test under s 475 of the *EPBC Act*. They also noted the test adopted by Chesterman J in *North Queensland Council Inc v Executive Director, Queensland Parks and Wildlife Service*,<sup>645</sup> in which the court held that a person ‘should have standing if it can be seen that his connection with the subject matter of the suit is such that it is not an abuse of process’.<sup>646</sup> However, ANEDO expressed concern with the second limb of that test, which requires that standing should not be granted where it would put another

<sup>637</sup> Matthew Groves, ‘Should the *Administrative Law Act 1978* (Vic) be Repealed?’ (2010) 34 *Melbourne University Law Review* 451, 471–473.

<sup>638</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 5; Greg Weeks, Submission No 8 (1 July 2011) 5; The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 11; Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 13; Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 6.

<sup>639</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 13.

<sup>640</sup> Ibid.

<sup>641</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 5.

<sup>642</sup> (1980) 146 CLR 493.

<sup>643</sup> (1994) 127 ALR 617.

<sup>644</sup> See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 475.

<sup>645</sup> [2000] QSC 172.

<sup>646</sup> Ibid [12].

citizen to great cost or inconvenience, arguing it would inhibit public interest litigation. PIAC submitted the liberal approach of open standing was the preferable option. They argued that ‘the rules of standing should be broadened to allow a wider class of people to bring civil proceedings’.<sup>647</sup> They noted that should it be necessary to safeguard against open standing, the *ADJR Act* could provide the court with a discretion to refuse standing in judicial review where it is apparently ‘frivolous or has no basis for establishing a prima facie case’.<sup>648</sup>

8.17 The only submissions opposed to this approach were those made by the Law Council of Australia and the Department of Immigration and Citizenship (DIAC). The Law Council submitted there would be little to gain from changing the current test in the *ADJR Act*, given that the common law ‘special’ or ‘sufficient’ interest tests and the ‘person aggrieved’ test in the *ADJR Act* are converging.<sup>649</sup> In their submission, amending the *ADJR Act* to adopt the test in s 27(2) of the *AAT Act* may lead to divergence with the common law standing rules.<sup>650</sup> DIAC did not support extending standing rules in relation to migration litigation, arguing that because it is the client’s interests that are most strongly affected, only the client, the client’s sponsor or the Minister should have the right to initiate proceedings.<sup>651</sup>

8.18 The Council agrees that judicial review proceedings do raise broader public interest issues than private law matters. This is particularly the case where a problem with one decision can reveal more systemic problems. It is also true that standing requirements mean that the validity of a particular decision-making scheme cannot be challenged until an appropriate person chooses to make an application.

8.19 However, the Council does not consider that open standing for judicial review proceedings is justified, particularly in the absence of the Government taking up the ALRC’s open standing recommendation in relation to public proceedings more generally.

8.20 The possibility of a person challenging a decision that relates to another individual or company raises the issue of access to information—an applicant would find it difficult to access sufficient information to make an application. Presumably the right to request reasons of the decision being challenged would not apply to the public at large, as this would raise privacy concerns and place an undue administrative burden on agencies. Formulating an application would therefore be difficult. It is unclear whether the open standing rule would provide much assistance in terms of successful review applications.

8.21 The Council is of the view that having some restrictions on standing provides a means of managing unmeritorious applications, and that providing for open standing would not produce major benefits for applicants. Ultimately, judicial review matters, unlike questions of the constitutional validity of legislation, are directed at the decision making in a

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<sup>647</sup> Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 6.

<sup>648</sup> Ibid.

<sup>649</sup> Law Council of Australia, Submission No 23 (1 July 2011) [68]–[71].

<sup>650</sup> Ibid [77].

<sup>651</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 7.



particular case. It therefore seems appropriate that only persons with some interests in the decision have the ability to make an application.

### **Aligning the standing rules for merits and judicial review**

8.22 The Council supports the adoption of the standing test in s 27(2) of the *AAT Act* for proceedings brought under the *ADJR Act*. The Council considers that this test will provide greater clarity in terms of which representative organisations have an interest in a proceeding, and ensure consistency between different subject matter areas.

#### **Recommendation 10**

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be amended to align the test for standing for representative organisations with that in subsection 27(2) of the *Administrative Appeals Tribunal Act 1975* (Cth).

## 9. REASONS FOR DECISIONS

### SUMMARY

9.1 The provision of reasons is of central importance to administrative law. The benefits of providing reasons to those affected by administrative decision making include:

- preventing disputes from occurring and from escalating;
- satisfying the requirements of natural justice and assisting in applications for review or appeal;
- providing evidence about the reason for a decision to assist tribunals and courts in performing merits and judicial review;
- improving the quality and consistency of primary decision making; and
- promoting public confidence in the administrative process through transparency.

9.2 In the 2010 decision, *Minister for Immigration and Citizenship v SZMDS*,<sup>652</sup> the High Court discussed the importance of reasons in setting out the findings of the decision maker on any question of fact. Gummow ACJ and Kiefel J commented that the obligation to set out material findings of fact ‘focuses on the thought processes of the decision maker and may disclose a jurisdictional error’.<sup>653</sup> Gummow ACJ and Kiefel J further observed that ‘the inadequacy of the material before the decision maker may support an inference that the decision maker has applied the wrong test or was not “in reality” satisfied of the requisite matters or from the absence of reasons the court may infer the absence of any good reason’.<sup>654</sup> This points to the second valuable feature of reasons—their usefulness in establishing in judicial review proceedings whether an error has been made in the making of a decision.

9.3 The Council also considers that the writing of reasons both assists administrative decision makers during the decision-making process, and results in the making of better quality decisions.

9.4 Given the importance of reasons, what should be the scope of the obligation to give them? Should there be a general statutory obligation to provide reasons, or is it more appropriate for the obligation only to have statutory backing either as an aid to seeking merits or judicial review, or as an explanation for a particular type of decision? Other questions include the appropriate time for giving or recording reasons, the form and content of reasons, exemptions from the obligation to give reasons and the consequences of a failure to give reasons.

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<sup>652</sup> (2010) 240 CLR 611.

<sup>653</sup> Ibid 623.

<sup>654</sup> Ibid 623.

## Chapter 9: Reasons for Decisions

9.5 The Council has concluded that few statutory amendments are needed in this area. Rather, the Council wishes to encourage the recording of reasons at the same time as a decision is made. It is important, however, that agencies comply with requests for reasons made under s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), and the Council recommends a statutory presumption that costs should be awarded in any cases where a person has to take the matter to court without the agency providing reasons on request.

### A GENERAL STATUTORY OBLIGATION TO GIVE REASONS?

9.6 As Gibbs CJ stated in *Public Service Board of New South Wales v Osmond* (*Osmond*):

there is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons.<sup>655</sup>

9.7 However, the common law may yet develop such a general obligation, and common law courts in other countries have been moving in this direction. The Supreme Court of Canada has recognised such an obligation.<sup>656</sup> Michael Taggart has observed that:

although the English and New Zealand courts have yet to go as far as the Supreme Court of Canada in recognising a generally applicable common law duty to give reasons on administrative decision makers, they have recognised an increasing number of exceptions to the rule, and it seems only a matter of time before the exceptions swallow the hoary old rules that reasons need not be given.<sup>657</sup>

9.8 However, as *Osmond* is still authority in Australia, the right to request reasons under the *ADJR Act* remains a significant statutory right. Section 13 of the *ADJR Act* provides that where there is a right of judicial review by the Federal Court under the Act, there is also a right to request and obtain from a decision maker a written statement of reasons for a decision. Schedule 2 sets out exclusions from this right. The question is whether there should be a general obligation to give reasons in relation to any government decision, unfettered by the jurisdictional test in the *ADJR Act*.

9.9 In addition, where an Act states that a person adversely affected by an administrative decision can request a statement of reasons for that decision, a statutory obligation arises. The *Administrative Appeals Tribunal Act 1975* (*AAT Act*)<sup>658</sup> and some other legislation<sup>659</sup>

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<sup>655</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

<sup>656</sup> *Bkaer v Canada (Minister of Citizenship and Immigration)* (1999) 174 DLR (4th) 193.

<sup>657</sup> Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1, 15. Mark Elliott states that while English law requires public bodies to give reasons, the scope of the duty is narrower than the scope of the application of other principles of good administration, and the legal and remedial consequences of a breach of the duty is ambiguous: Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' (2011) *Public Law* 56.

<sup>658</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

<sup>659</sup> For example, specified decisions under the *Environmental Protection and Biodiversity Act 1999* (Cth) s 77.

provides for a right to reasons for a decision. In other cases, reasons must automatically be given along with the notification of an adverse decision—for example, certain decisions of the Minister under the *Migration Act 1958* (Cth) (*Migration Act*),<sup>660</sup> and decisions by the Australian Competition and Consumer Commission<sup>661</sup> and Commissioner of Taxation.<sup>662</sup> An agency may also be required to provide notification of a proposed decision that includes reasons, in order to accord procedural fairness by allowing a person to respond to any adverse information or inferences.<sup>663</sup>

9.10 Professors Robin Creyke and John McMillan identify three kinds of arguments in support of providing reasons. First, ‘instrumentalist arguments’ maintain that ‘the requirement to provide reasons for decisions ... encourage[s] better and more rational decision-making’.<sup>664</sup> Secondly:

the requirement for administrative decision-makers to provide reasons for their decisions is thought to enhance government transparency and accountability and give legitimacy to a decision by showing that the decision was not made arbitrarily and that issues raised by interested parties have been adequately considered.<sup>665</sup>

9.11 Thirdly, the ‘more highly contested’ group of arguments, which ‘might be called the procedural fairness arguments’:<sup>666</sup>

are based on an individual-rights model of administrative decision-making and assert that, as a matter of fairness, there should be a duty to provide reasons for decisions so people affected can decide whether the decision has been lawfully made and why they have not succeeded; whether there are grounds for review or appeal; and to assess the strength of the case against them should they seek review or appeal.<sup>667</sup>

9.12 There are a number of countervailing arguments as to the usefulness and importance of reasons. There is no evidence that reasons actually enhance government transparency and accountability. In fact, Emeritus Professor Mark Aronson, Bruce Dyer and Associate Professor Matthew Groves point out that a requirement to provide reasons may lead to decision makers basing their reasons on previously accepted justifications, often in standardised formats.<sup>668</sup> In relation to the procedural fairness argument, the courts have indicated that procedural fairness only applies to the process leading up to the decision. In *Osmond*, Gibbs CJ stated that ‘the rules of natural justice are designed to ensure fairness in the

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<sup>660</sup> *Migration Act 1958* (Cth) s 501G.

<sup>661</sup> *Competition and Consumer Act 2010* (Cth) ss 151BD and 151BM.

<sup>662</sup> *Taxation Administration Act 1953* (Cth) s 8AAG, sch 1 item 280-165.

<sup>663</sup> *Defence (Personnel) Regulations 2002* (Cth) regs 73, 76, 85; *Air Navigation Regulations 1947* (Cth) reg 18D; *National Measurement Regulations 1999* (Cth) reg 82; *Airports (Control of On-Airport Activities) Regulations 1997* (Cth) regs 4AS, 4AX, 4BH and 4BR.

<sup>664</sup> Robin Creyke and John McMillan, *Control of Government Action. Text, Cases and Commentary* (Lexis Nexis, 2<sup>nd</sup> ed, 2009) 1261.

<sup>665</sup> *Ibid.*

<sup>666</sup> *Ibid.*

<sup>667</sup> *Ibid.*

<sup>668</sup> Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 628.

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making of a decision and it is difficult to see how the fairness of an administrative decision can be affected by what is done after the decision had been made'.<sup>669</sup>

9.13 Submissions to the Council acknowledged that providing reasons forms part of good administrative practice that contributes to transparency and accountability of government decision making.<sup>670</sup> The Commonwealth Ombudsman argued that reasons reveal whether the decision maker has considered all relevant information, as well as providing a foundation for people to question and challenge decisions. The Ombudsman's submission was that reasons should be provided where a failure to do so would be a breach of natural justice, where there is a right of appeal, or where the decision in question is of a judicial nature.<sup>671</sup> The Office of the Australian Information Commissioner (OAIC) submitted that reasons provide an affected person with the opportunity to understand the decision.<sup>672</sup>

9.14 While there was some support for the introduction of a general statutory obligation to provide reasons,<sup>673</sup> possibly subject to exemptions,<sup>674</sup> most stakeholders did not support a general statutory obligation to provide reasons. The Department of Agriculture, Fisheries and Forestry (DAFF) argued that 'any further statutory right to give reasons would need to be flexible in order to take account of differing environments in which decisions are made'.<sup>675</sup> The Australian Taxation Office (ATO) referred to the Taxpayer's Charter, which sets out the ATO's policy that decisions will be explained, generally in writing. The ATO commented that 'these current practices satisfactorily result in the provision of reasons for decisions ... [and] similar practices should be encouraged in lieu of specifically providing an obligation to provide reasons'.<sup>676</sup> Other agencies provide reasons on request wherever possible.<sup>677</sup>

9.15 Arguments against a general obligation to provide reasons were based on the nature of information that might need to be included. Both the Department of Defence (Defence) and the Attorney-General's Department (AGD) suggested that an obligation to provide reasons independent of the merits review context must be subject to the need to protect information, the disclosure of which would be contrary to the public interest because it would prejudice the security, defence, law enforcement or international relations of Australia.<sup>678</sup>

9.16 With respect to the protection of sensitive information, the courts have intimated that the case-by-case approach of the common law is appropriate, given the many different contexts (and public interest considerations) of administrative decision making.<sup>679</sup> For

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<sup>669</sup> (1986) 159 CLR 656, 669.

<sup>670</sup> Department of Agriculture, Fisheries and Forestry, Submission No 16 (1 July 2011) 3, Office of the Australian Information Commissioner, Submission No 17 (5 July 2011) 4.

<sup>671</sup> Commonwealth Ombudsman, Submission No 15 (8 July 2011) 6.

<sup>672</sup> Office of the Australian Information Commissioner, Submission No 17 (5 July 2011) 4.

<sup>673</sup> Ibid 4; Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 14; Department of Defence, Submission No 4 (24 June 2011) 6.

<sup>674</sup> The Law Society of New South Wales Young Lawyers, Submission No (1 July 2011) 12; Australian Crime Commission, Submission No 5 (6 July 2011) 9.

<sup>675</sup> Department of Agriculture, Fisheries and Forestry, Submission No 16 (1 July 2011) 2.

<sup>676</sup> Australian Taxation Office, Submission No 13 (1 July 2011) 9.

<sup>677</sup> The Fair Work Ombudsman do this despite being exempt from the operation of the *ADJR Act*.

<sup>678</sup> Department of Defence, Submission No 4 (24 June 2011) 6; Attorney-General's Department (Cth), Submission No 21 (9 August 2011) 8.

<sup>679</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

example, large and complex competition rulings of the Australian Competition and Consumer Commission may warrant protection from disclosure for reasons of market integrity. However, there is no obvious reason why procedural decisions affecting a single applicant's rights should not normally be disclosed.

9.17 Related arguments were based on workload considerations. The Australian Crime Commission (ACC) submitted that, if required to provide reasons in relation to every summons or notice issued under the *Australian Crime Commission Act 2002* (Cth) (*ACC Act*), it would have to redact every document so as not to disclose elements of ACC intelligence that could assist criminal groups in counter measures.<sup>680</sup> The ACC submitted that redacting would impose a significant administrative burden, and that while it would produce legally compliant documents, it would not assist in assessing the merits of the decision.<sup>681</sup>

9.18 The Government makes a broad range of decisions, and it is difficult to provide a 'one size fits all' approach on the obligation to give reasons. In some cases, reasons can be provided on request, but they may not meet the standard of statements of reasons in accordance with s 13 of the *ADJR Act*. For example, formal reasons are not provided for appointment decisions, but panels provide reports on applicants, which would be available under the *Freedom of Information Act 1982* (Cth) (*FOI Act*). In the case of computer-assisted decision making, standard form reasons may be provided with the decision, but these may not comply with s 13 requirements. Other examples that might be problematic include the decisions of Ministers that are based on recommendations of others and situations where a decision maker is bound to accept a decision of a third party—as with migration decisions which rely upon the assessment of medical officers.

9.19 Similarly, non-statutory decisions have different considerations when it comes to the provision of reasons. For example, there are a number of government grants programs with no formal application process where reasons will not be prepared to explain why one organisation was chosen rather than another. On the other hand, usually where there is a formal application process, reasons will be provided to applicants.

9.20 Many stakeholders submitted that s 13 of the *ADJR Act* operates well to provide consistency in the obligation to provide reasons, as well as allowing for exceptions.<sup>682</sup> Importantly it allows parties to receive a statement of reasons in an efficient manner without the need to commence proceedings.<sup>683</sup> Drs Peter Billings and Anthony Cassimatis supported the current formula contained in the *ADJR Act*, specifically that reasons are restricted to final decisions to avoid 'fragmentation of decision-making processes'.<sup>684</sup>

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<sup>680</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 9.

<sup>681</sup> Ibid 10.

<sup>682</sup> Law Council of Australia, Submission No 23 (1 July 2011) [81]; Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 7; Victoria Legal Aid, Submission No 14 (7 July 2011) 4; Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011).

<sup>683</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 8.

<sup>684</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 14. See also Commonwealth Ombudsman, Submission No 15 (8 July 2011) 6.



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9.21 In the absence of a general obligation, there was also support for a requirement to provide reasons located within the enactment that provides authority for the decision.<sup>685</sup> Many statutory decision-making structures already have a specific requirement to provide contemporaneous reasons. For example, reasons are required by legislation relating to social security, veterans' affairs, freedom of information, passports, corporations, environmental protection, communications and many other areas of public administration. As a result, many other agencies already provide reasons for the majority of their decisions when notice of the decision is provided.

9.22 The Superannuation Complaints Tribunal submitted that their current practice is to provide reasons with the notification of the Tribunal's decision. The Department of Immigration and Citizenship (DIAC) noted that where an application for a visa has been refused, reasons for the decision are also provided to the applicant with the notification of the decision. In some particular cases, for example as in s 236 of the *Social Security Act 1991* (Cth), broader obligations might be appropriate.<sup>686</sup>

### No need for a general statutory obligation

9.23 The Council's view is that the existing statutory requirements to provide reasons are sufficient in that they are available to support applications for merits and judicial review of a decision. A general obligation to provide reasons for all statutory and non-statutory decisions may have unintended consequences, particularly in relation to non-statutory decision making, as it may be difficult to assess the extent and nature of all non-statutory government decisions. It would be difficult to frame a requirement that would be suitable for this wide range of decisions.

9.24 Given the evidence that has been provided about current practices of agencies, the Council considers that it would be an undue administrative burden to introduce a statutory requirement for a statement of reasons to be provided for all decisions at the time the decision is communicated.

9.25 Where the right to reasons is not legally available, agencies may nonetheless choose to provide reasons upon request. Indeed, the Council has stated that, even if there is a *prima facie* exemption from the obligation to give reasons under an Act, it is good administrative practice to provide reasons unless there are good grounds for not doing so. Below, the Council discusses the importance of the recording of those reasons at the time the decision is made.

9.26 Given the strength of support for this practice as indicated in the submissions, the Council supports a charter approach as an alternative to a statutory obligation. The development of a Charter of Good Administration as recommended in the 2009 report of the Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, would provide the appropriate framework for such an obligation. That report

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<sup>685</sup> Office of the Australian Information Commissioner, Submission No 17 (5 July 2011) 4.

<sup>686</sup> Victoria Legal Aid, Submission No 14 (7 July 2011) 4.

recommended a Charter of Good Administration should be developed by the Department of Prime Minister and Cabinet and the Attorney-General's Department, in consultation with the Commonwealth Ombudsman. The Council supports that recommendation.

## **WHEN SHOULD REASONS BE RECORDED AND CONVEYED?**

9.27 The Consultation Paper considered at what stage of the decision-making process reasons for an administrative decision should be made available. Under s 13 of the *ADJR Act*, there is no obligation to provide reasons until a request is made.

9.28 If reasons are not provided at the time of the decision, it is possible that the statement of reasons provided in response to the request may not accurately record the basis for the decision. This is more likely in cases where one or more of the following apply:

- the actual reasons for the decision have not been recorded;
- the statement of reasons is prepared by a legal adviser;
- the original decision maker is no longer available; and
- the decision maker is a Minister who has made a decision on the basis of a recommendation which does not clearly disclose the findings and the reasons for the decision.<sup>687</sup>

## **Timing of the recording and giving of reasons**

9.29 The Council considers that the timing of the recording of reasons is particularly important, noting the important distinction between the right to be given reasons and the obligation to record reasons.<sup>688</sup> The OAIC noted that it is a matter of good administrative practice to provide a statement of reasons at the time of the decision.<sup>689</sup> The OAIC pointed out that, where a decision maker is not required to provide reasons at the time the decision is made, an accurate record of the reasons for the decision should be kept to assist in preparing a statement of reasons at a later date.<sup>690</sup>

9.30 NSW Young Lawyers argued that the implementation of an obligation on decision makers to provide a statement of reasons at the time of the decision 'would assist decision makers to deliberate carefully in their decision making and may also help administrative agencies to formulate rules and standards for application in future decision making'.<sup>691</sup>

9.31 In guidance material published by the Council on the preparation of statements of reasons, the Council has recommended that a record of the assessment of evidence, findings

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<sup>687</sup> Stephen Lloyd SC and Donald Mitchell, 'Statement of the decision maker's actual reasons' (2010) 59 *Admin Review* 54.

<sup>688</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 9.

<sup>689</sup> Office of the Australian Information Commissioner, Submission No 17 (5 July 2011) 4.

<sup>690</sup> Ibid.

<sup>691</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 12.

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of fact and reasons for the decision be produced at the time the decision is made.<sup>692</sup> The Council still strongly supports this view.

### *The evidential status of reasons*

9.32 The issue of contemporaneous recording of reasons has also arisen in the courts. There is a line of authorities that calls into question the admissibility of a statement of reasons that was not prepared at the time of the decision.

9.33 For example, in *Minister for Immigration and Ethnic Affairs v Taveli*,<sup>693</sup> Davies and Hill JJ (French J disagreeing on this issue) held that the tender of a statement of reasons prepared more than a month after the decision was made had been correctly rejected by the trial judge (on the ground that the tender of an unverified statement of reasons prepared after the event would only be admissible if a ground of admissibility could be established—such a ground had not been made out in this case). The court’s reasoning was that reasons prepared after the fact should reflect the actual reasons for the decision, and should not include evidence which only came to light after the decision was made, even if that further evidence tended to support the decision.

9.34 An aspect of the *Taveli* decision, which may be of particular importance to administrators, is the view expressed by Davies and Hill JJ that, if the statement of reasons were to accompany the decision concerned, it would be admissible as part of the *res gestae*.<sup>694</sup> This suggests that, particularly on occasions when the decision maker considered that a challenge to the decision in the Federal Court was likely, there would be a distinct advantage for the decision maker in providing the statement of reasons contemporaneously with notification of the decision. Provision by decision makers of a statement of reasons at this point, rather than *ex post facto*, would ensure that they would not be liable to be required to attend for cross-examination. While this might not be the approach to be taken for all decisions, it might be worthwhile for cases where there is a likelihood of judicial review.

9.35 There are also other methods of proof, such as an affidavit, which can be used to provide evidence of the reasons for the decision if the decision maker is not available.<sup>695</sup> The decision in *George v Minister for Immigration & Multicultural & Indigenous Affairs*,<sup>696</sup> on the other hand, demonstrates the difficulties where there is no contemporaneous record of the decision. In that case, the Court did not permit an affidavit to be tendered by a person who

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<sup>692</sup> See Administrative Review Council, *Commentary on the Practical Guidelines* (Commonwealth of Australia, 2002) 34; Administrative Review Council, *Best Practice Guide No 4 Decision Making: Reasons* (Commonwealth of Australia, 2008) 10.

<sup>693</sup> (1990) 23 FCR 162.

<sup>694</sup> *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162.

<sup>695</sup> Stephen Lloyd and Donald Mitchell, ‘Statements of the decision maker’s actual reasons’ (2010) 59 *Admin Review* 57. See also *Thomas Lincoln Chapman, Wendy Jennifer Chapman and Andrew Lincoln Chapman v the Honourable Robert Tickner, Minister of Aboriginal and Torres Strait Islander Affairs* (1995) 55 FCR 316. In that case the Federal Court accepted affidavit evidence submitted by the Minister on matters which were not referred to in the s 13 statement of reasons.

<sup>696</sup> [2004] FCA 38.

was not the original decision maker, stating that it would be ‘unprincipled’ and noting ‘the dangers and difficulties relating to statements of reasons prepared after the event’.<sup>697</sup>

9.36 In the 2008 decision in *Phosphate Resources Ltd v Minister for Environment, Heritage and the Arts*,<sup>698</sup> Buchanan J rejected the detailed statement of reasons prepared for the Minister in relation to a decision under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) as a statement of his real reasons for the decision. Among other matters raised, Buchanan J held that the presumption of regularity ‘does not give evidentiary priority to an explanation brought into existence after the power is exercised’.<sup>699</sup> His Honour also rejected a submission that the Minister had adopted the statement of reasons prepared by departmental officers as his own, considering (among other matters) that it had been prepared some six weeks after the decision had been made.<sup>700</sup>

9.37 In Report No 33, *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, the Council made a recommendation in relation to the admissibility and evidentiary value of statements of reasons. Recommendation 4 suggested that:

The *ADJR Act* ought to be amended along the following lines:

- when a copy of a statement furnished under section 13 in relation to a decision is tendered by the decision maker in proceedings under the Act for an order of review in respect of the decision, the copy is admissible as evidence of the reasons for the decision if:
  - (a) the decision maker has given the applicant prior notice of intention to tender the statement as evidence of those reasons; and
  - (b) the applicant does not object to the tender;
- if the applicant objects to the tender, the Federal Court may, at its discretion, give leave to admit the statement into evidence without attendance by the decision maker for examination;
- in exercising its discretion, the Federal Court must take into account:
  - (a) the nature of the grounds of review upon which the applicant relies; and
  - (b) the desirability, in all the circumstances of the case, of the decision maker verifying by affidavit the reasons for the decision;
- if the Federal Court refuses to give leave but the decision maker still wishes to tender the statement, the decision maker must verify the statement by affidavit and must be available for cross examination on the statement;

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<sup>697</sup> *George v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 38, [39].

<sup>698</sup> (2008) 251 ALR 80.

<sup>699</sup> *Phosphate Resources Ltd v Minister for Environment, Heritage and the Arts* (2008) 251 ALR 80 [161].

<sup>700</sup> *Ibid* [167].

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- the weight to be accorded to a statement of reasons tendered by the decision maker is a matter for the Federal Court.

9.38 It may be that an amendment to the *ADJR Act* to the effect that a statement of reasons would be *prima facie* evidence of the reasons for the decision, if it can be proved that the reasons were produced at the time of the decision, or that the reasons were based on a record made at the time of the decision, would provide some incentive to decision makers to record reasons at the time of the decision.

### *Encouraging contemporaneous recording of reasons*

9.39 The Council is concerned that an amendment to the *ADJR Act* along the lines discussed above may appear to suggest that decisions other than those prepared at the time of the decision are not the real reasons for those decisions. There may be valid reasons for delaying the production of reasons for a decision. Putting such a provision into the *ADJR Act* also risks increasing disputes around the validity of non-contemporaneous reasons. A provision of this nature might be counterproductive because, on the one hand it would be intended to encourage decision making and giving reasons to occur at the same time (with the goal of improving decision making). On the other hand, a failure to observe the requirements of the provision could be interpreted to render a decision invalid (which would not enhance decision making).

9.40 The Council considers that the contemporaneous recording of reasons by decision makers has a number of significant advantages. First, reasons recorded at the time of making are more likely to reflect a decision maker's actual reasons. Secondly, contemporaneous reasons can be provided at the time notice of the decision is given, improving overall communication. Thirdly, the process of writing reasons materially assists decision-makers during the process—facilitating the detailed consideration of all necessary issues. The process of providing for reasons disciplines a decision maker's thinking.

9.41 The Council's view is that the contemporaneous recording of reasons is a principle of good administration, which should be reflected in agency best practice and in any Charters of Good Administration.

### **Recommendation 11**

All Australian Government agencies should endeavour to record reasons at the time of making decisions.

### **Statement of reasons not prepared by the decision maker**

9.42 Statements of reasons that are not prepared by the decision maker raise more significant issues than reasons prepared by the decision maker at a later time. Stephen Lloyd SC and Donald Mitchell have noted the issue of legal practitioners 'settling'

draft reasons to remove legal errors.<sup>701</sup> There are risks associated with this practice. While it removes the error from the record, the decision may still be affected by the legal error. Lloyd and Mitchell also point out that such advice would be protected by legal professional privilege and not subject to scrutiny by the courts.<sup>702</sup> They suggested that the Council could provide directions to Government officials on the kind of advice that should and should not be sought from legal practitioners about reasons.<sup>703</sup>

9.43 The absence of the original decision maker is a particular instance where not providing contemporaneous reasons or records of a decision is problematic. Lloyd and Mitchell suggest that when this is the case, the person currently responsible for the area should give their own reasons for the decision, and remake the decision if they consider it is incorrect.<sup>704</sup> This would ensure that the reasons are the actual reasons for the decision.

9.44 Evidentiary problems have arisen in relation to Ministerial decisions where the only reasons available are either a submission to the Minister from an agency recommending a particular approach, or ex post facto reasons prepared by the agency. As a matter of practice, Lloyd and Mitchell suggest that, where appropriate, agencies could provide a statement of reasons with a submission for the Minister to sign, which he/she can alter as necessary.<sup>705</sup>

9.45 There is already some guidance from the Council on the preparation of statements of reasons,<sup>706</sup> which includes reference to when the original decision maker is not available<sup>707</sup> and the preparation of draft statements of reasons.<sup>708</sup> In preparing updated versions of this material, the Council will consider the need for material about reliance upon advice from legal practitioners in the preparation of statements of reasons and the preparation of reasons for decisions made by Ministers.

#### **Recommendation 12**

The Administrative Review Council should update its guidance material on the preparation of statements of reasons, especially with respect to:

- (a) the kind of advice that should and should not be obtained from legal practitioners in relation to the preparation of statements of reasons; and
- (b) to deal with situations where the original decision maker is no longer available to prepare a statement of reasons or where Ministers are decision makers.

<sup>701</sup> Stephen Lloyd and Donald Mitchell, 'Statements of the decision maker's actual reasons' (2010) 59 *Admin Review* 56.

<sup>702</sup> Ibid.

<sup>703</sup> Ibid.

<sup>704</sup> Ibid.

<sup>705</sup> Ibid.

<sup>706</sup> Administrative Review Council, *Commentary on the Practical Guidelines* (Commonwealth of Australia, 2002); Administrative Review Council, *Best Practice Guide 4—Decision Making: Reasons* (Commonwealth of Australia, 2008).

<sup>707</sup> Administrative Review Council, *Commentary on the Practical Guidelines* (Commonwealth of Australia, 2002) 24.

<sup>708</sup> Ibid 33.



## FORM AND CONTENT OF REASONS

9.46 When reasons are sought under a specific statute, they usually have to include certain information. The statement generally must:<sup>709</sup>

- set out the decision;
- list the findings on material facts (those facts on which the decision turns);
- refer to the evidence for the findings; and
- give the reasons for the decision (including any legal principles relied on).

9.47 The Council also recommends (in guidance material it has published), that statements of reasons set out the appeal rights available to the applicant.<sup>710</sup> Some statutory schemes also require this.<sup>711</sup> The joint submission of the Migration Review Tribunal–Refugee Review Tribunal argued that the requirement to set out reasons containing this information promotes ‘public confidence in the integrity of the administrative process’ and has a ‘normative effect on primary decision making’.<sup>712</sup>

9.48 In *Avon Downs Pty Ltd v FCT*,<sup>713</sup> Dixon J said that where a decision maker is not required to give reasons for not being satisfied about a matter, a full consideration of what was before them may show that the decision reached is capable of explanation only on the ground of the jurisdictional error. Dixon J explained that it is ‘not necessary that you should be sure of the precise particular in which [the decision maker] has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law’.<sup>714</sup>

9.49 The appropriateness or adequacy of reasons that are given for a decision will depend upon whether it is a formal statement of reasons in accordance with s 13 of the *ADJR Act* or whether reasons are being provided at the time of the decision when there is no formal obligation to do. The Commonwealth Ombudsman noted that:

a common cause of complaints is the adequacy of reasons provided by agencies. It is the Ombudsman’s experience that providing a clear explanation of the reasons for a decision can reduce a person’s concerns, even if the decision cannot be altered.<sup>715</sup>

9.50 The Ombudsman submitted that a statement of reasons should be in writing (a letter is normally sufficient) and must contain in ‘plain English, the relevant facts and material considerations which the decision maker relied on in making the final decision’.<sup>716</sup> The Ombudsman acknowledged that less formal methods of providing reasons may be

<sup>709</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13(1); *Acts Interpretation Act 1901* (Cth) s 25D.

<sup>710</sup> Administrative Review Council, *Best Practice Guide 4—Decision Making: Reasons* (2007) 9.

<sup>711</sup> *Australian Securities and Investments Commission Act 2001* (Cth) s 244A.

<sup>712</sup> Migration Review Tribunal–Refugee Review Tribunal, Submission No 10 (5 July 2011) [13].

<sup>713</sup> (1949) 78 CLR 353, 360.

<sup>714</sup> *Avon Downs Pty Ltd v FCT* (1949) 78 CLR 353, 360.

<sup>715</sup> Commonwealth Ombudsman, Submission No 15 (8 July 2011) 6.

<sup>716</sup> *Ibid* 7–8.

appropriate, given the burden that a general statutory requirement to provide reasons may place on agencies.

9.51 Some stakeholders proposed ways in which s 13 of the *ADJR Act* could be improved. The Ombudsman, the OAIC and NSW Young Lawyers submitted that the reasons should contain information about the rights of review.<sup>717</sup> While the Council considers that this is a good practice in relation to statements of reasons,<sup>718</sup> it does need to be a formal requirement for the purposes of s 13 of the *ADJR Act*.

9.52 The ACC argued that there should be an express provision to provide an indication that ‘the decision maker is satisfied that any legal preconditions for the exercise of the power have been satisfied’.<sup>719</sup> The Council considers that this is implicit in any decision made that purports to be validly made, rather than a key element of a statement of reasons. Such a phrase may, in fact, create unnecessary confusion for the recipients of reasons.

9.53 The Law Council of Australia argued that there is no evidence that the requirements in s 13 of the *ADJR Act* are too legalistic and the ‘content of the requirement to give reasons could arguably be enhanced’.<sup>720</sup> The Law Council of Australia submitted that there should be an additional requirement that reasons ‘address the critical arguments, issues, and evidence raised by a party directly affected by the decision’ or contain other information which aids a party to understand how their evidence was dealt with.<sup>721</sup> The Council considers that this formulation does not add to the current formulation in the *ADJR Act*, requiring a statement to list the findings on material facts and refer to evidence of the findings.

9.54 The Australian Network of Environmental Defenders Offices (ANEDO) proposed that there should be a ‘standard setting that identifies the applicable legislation, the findings of fact, the decision, and the reasoning behind the decision’.<sup>722</sup> They also suggested that decision makers be required to attach documents that contributed to the decision to their statements, arguing that this ‘would greatly increase transparency in the decision making process’.<sup>723</sup> In particular, they suggested this would assist public interest litigants in obtaining ‘the full picture’.<sup>724</sup> The Council considers that, while providing attachments may be useful in particular contexts, it could make the process of producing reasons overly cumbersome, and detract from the communication value of reasons by confusing and overwhelming recipients.

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<sup>717</sup> Commonwealth Ombudsman, Submission No 15 (8 July 2011) 8; Office of the Australian Information Commissioner, Submission No 17 (5 July 2011) 5; The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 12.

<sup>718</sup> See Administrative Review Council, *Commentary on the Practical Guidelines* (Commonwealth of Australia, 2002) 29; Administrative Review Council, *Best Practice Guide No 4 Decision Making: Reasons* (Commonwealth of Australia, 2008) 9.

<sup>719</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 11.

<sup>720</sup> Law Council of Australia, Submission No 23 (1 July 2011) 16.

<sup>721</sup> Ibid.

<sup>722</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 8.

<sup>723</sup> Ibid.

<sup>724</sup> Ibid.

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9.55 The OAIC suggested that the form of reasons should be comparable to that required by s 26 of the *FOI Act*.<sup>725</sup> They submit that reasons should include:

- the decision;
- findings on material questions of fact;
- evidence on which those findings are based;
- reasons for decision;
- name and designation of person giving the decision; and
- the applicant's review and complaint rights.

The Council does not consider that these requirements differ markedly from the current requirements in the *ADJR Act*.

9.56 A number of submissions stressed the importance of reasons reflecting the basis on which the decision is made and the material taken into account, as required by the *ADJR Act*.<sup>726</sup> The Public Interest Advocacy Centre (PIAC) argued that the critical requirements for the content of reasons remain the same despite the differing contexts in which decisions are made. The critical requirements include the 'evidence on which each material finding of fact is based, and the actual reasons relied upon by the decision maker at the time of making the decision'.<sup>727</sup>

9.57 The AGD argued that best practice principles should outline the content of reasons to avoid rigid requirements that might render statements unhelpful. The AGD also submitted that agencies should be able to produce classified and unclassified statements of reasons in order to balance the confidential nature of sensitive information with procedural fairness.<sup>728</sup>

### Maintaining the current statutory requirements

9.58 The Council does not consider that any of the proposed changes to the *ADJR Act* requirements in s 13 as to the form of reasons are necessary, because the key features identified in submissions are already reflected in s 13. Having too many requirements risks making reasons less accessible, and too focused on potential judicial review applications rather than communication of the basis of the decision. The Council's view is that reasons should clearly communicate the actual reasons for a decision in a simple, understandable way.

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<sup>725</sup> Office of the Australian Information Commissioner, Submission No 17 (5 July 2011) 5–6.

<sup>726</sup> Victoria Legal Aid, Submission No 14 (7 July 2011) 5; Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 8;

<sup>727</sup> Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 8.

<sup>728</sup> Attorney-General's Department (Cth), Submission No 21 (9 August 2011) 10.

## CONSEQUENCES OF A FAILURE TO GIVE REASONS

9.59 Section 13(3) of the *ADJR Act* provides that:

Where a person to whom a request is made under subsection (1) is of the opinion that the person who made the request was not entitled to make the request, the first-mentioned person may, within 28 days after receiving the request:

- (a) give to the second-mentioned person notice in writing of his or her opinion;  
or
- (b) apply to the Federal Court or the Federal Magistrates Court under subsection (4A) for an order declaring that the person who made the request was not entitled to make the request.

9.60 Section 13(4A) allows the person to whom a request is made or a person given notice under s 13(3) to apply to the court for ‘an order declaring that the person who made the request concerned was, or was not, entitled to make the request’. If the person to whom the request was made does not provide notice under s 13(3), however, the *ADJR Act* does not provide a mechanism for compelling the production of reasons.

9.61 If a decision maker fails to supply a statement of reasons when requested to do so, an applicant could seek a writ of mandamus to command the furnishing of reasons by the decision maker. In *Clanwilliam Pty Ltd v Bartlett*, Fitzgerald J explained that:

there are doubts attendant upon whether or not an order may be made under the [*ADJR Act*] for the provision of [a s 13 statement], at least prior to the commencement of the proceedings for the review of the decision in respect of which the statement is requested.<sup>729</sup>

9.62 Providing for judicial review of a failure to provide reasons contradicts a central purpose of the right to reasons: providing an opportunity to determine whether there is any basis for commencing an action. In *Clanwilliam Pty Ltd v Bartlett* the applicant commenced proceedings under s 39B of the *Judiciary Act* for an order of mandamus compelling the production of reasons. Fitzwilliam J noted that:

in the cases to which s 13 of the Act applies, there is a clear statutory obligation upon decision-makers, although officers of the Commonwealth, to supply statements, and there is no doubt, in my opinion, that that duty can be enforced by an order of the court.<sup>730</sup>

Here, the Department of Health had informed the applicant that reasons were close to finalisation, and that the application for mandamus was therefore a waste of time and costs.<sup>731</sup>

9.63 Even if there is no formal requirement to give reasons, in certain circumstances the courts may infer that a decision maker who has not given reasons had no proper basis for that

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<sup>729</sup> *Clanwilliam Pty Ltd v Bartlett* (Unreported, Federal Court of Australia, Fitzgerald J, 8 May 1984). Quoted in (1984) 6 Administrative Law Notes 61.

<sup>730</sup> Ibid.

<sup>731</sup> Ibid.

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decision<sup>732</sup> and thus the decision is reviewable as an error of law or on other grounds, such as the failure to take into account relevant considerations.<sup>733</sup> This does not necessarily justify the setting aside of a decision. However, the court may order the provision of a statement of reasons or amended reasons in such a case.

9.64 Reasons may be held to be inadequate if they are insufficient to assist the person affected to decide whether to challenge the decision or to assist the process of review of the decision.<sup>734</sup> If the reasons for the decision are inaccurate, wrong, need other reasons or evidence, or have to be supplemented, the original decision may be found to be unlawful by a court or tribunal.<sup>735</sup> The applicant may also be eligible for discretionary compensation under the scheme for Compensation for Detriment caused by Defective Administration (CDDA).<sup>736</sup>

9.65 In Report No 33, the Council recommended giving the Federal Court power to order the furnishing of a statement of reasons under the section.<sup>737</sup> In making this recommendation, the Council noted that it would be expensive to activate the judicial review procedure in the *ADJR Act* or under s 39B of the *Judiciary Act* for the purpose of obtaining a statement of reasons. Furthermore, it would seem to be contrary to one of the major reasons for imposing the reasons requirement if a person were to be required to commence judicial review proceedings for the purpose of determining whether there are grounds for commencing separate proceedings. The Council concluded that a simpler means of obtaining the production of a statement of reasons would seem to be required. This recommendation has not been implemented to date.

9.66 Billings and Cassimatis submitted that the current system of being able judicially to enforce the right to reasons, where reasons have been refused or are inadequate, should continue. They noted the development of the constitutional judicial review grounds ‘such that a failure to provide adequate reasons may also undermine the legality of the particular decision’.<sup>738</sup> The Law Council of Australia noted that ‘a powerful incentive for providing comprehensive reasons for decision is (or at least ought to be) that the failure to refer to particular evidence or issues can justify an inference that the decision maker did not consider that material relevant’.<sup>739</sup>

9.67 It is arguable that an incentive to give reasons is provided in the fact that an absence or inadequacy of reasons may undermine the legality of a decision. In practice, it is more likely that this fact will delay the provision of reasons. If delay is excessive and unexplained, applicants can seek assistance from the Ombudsman in the first instance, although time may

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<sup>732</sup> *Public Service Board v Osmond* (1986) 59 CLR 656, 663–66 (Gibbs CJ).

<sup>733</sup> Administrative Review Council, *Commentary on the Practical Guidelines for preparing statements of reasons* (2002) 8.

<sup>734</sup> Ibid 41.

<sup>735</sup> Ibid.

<sup>736</sup> Department of Finance and Deregulation, *Discretionary Compensation and Waiver of Debt Mechanisms*, Finance Circular 2009/09.

<sup>737</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions*, Report No 33 (1991) rec 3.

<sup>738</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 16.

<sup>739</sup> Law Council of Australia, Submission No 23 (1 July 2011) [93].

not allow this course of action if they wish to make an application for judicial review under the *ADJR Act*, which has a 28 day time limit.

9.68 A number of submissions argued that the consequences of a failure to provide reasons should depend on the context.<sup>740</sup> The Law Council of Australia said the consequence should be left to the courts ‘to determine as the nature of the case requires’.<sup>741</sup> DIAC and the ACC both stressed that a failure to provide reasons should not automatically invalidate a decision.<sup>742</sup>

9.69 The ACC suggested that there should be a ‘rebuttable presumption that a decision maker who failed to provide reasons when required to do so by law had no sufficient reasons for the decision made’.<sup>743</sup> The ACC identified that ‘if the decision is challenged, but ultimately upheld, the failure to provide reasons could be a reason for nevertheless awarding costs against the decision maker’.<sup>744</sup> PIAC and Billings and Cassimatis both submitted that there should be provisions relating to cost protections, similar to s 50 of the *Judicial Review Act 1991* (Qld), for applicants who request reasons.<sup>745</sup>

9.70 NSW Young Lawyers submitted that the present statutory scheme does not sufficiently provide for the situation for a failure to respond to a request for reasons. They argued that a failure to provide reasons should give rise to an automatic finding of procedural unfairness in favour of the affected party, in line with the court’s approach in *Collins v Repatriation Commission*.<sup>746</sup> The Council refers to the discussion above regarding *Osmond*, in which the High Court held that, in most cases, a failure to give reasons will not result in a finding of procedural unfairness. As discussed above, procedural fairness ultimately relates to the process of making a decision. Reasons, while important, relate to the communication of a decision and should not invalidate a properly made decision.

9.71 The OAIC submitted that, in response to a failure to provide adequate reasons, ‘the decision maker could be required within a specified period to provide adequate or better reasons for their decision’.<sup>747</sup> The OAIC noted that s 55E of the *FOI Act* and s 28(5) of the *AAT Act* provide a similar power.

## **Agency to pay costs where an application is made to the court**

9.72 The Council does not see any practical benefit from the inclusion of an additional power for the Federal Court to make an order requiring a statement of reasons as recommended by the Council in Report No 33. The Council considers that this would create

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<sup>740</sup> Attorney-General’s Department (Cth), Submission No 21 (9 August 2011) 11; Law Council of Australia, Submission No 23 (1 July 2011) [92].

<sup>741</sup> Law Council of Australia, Submission No 23 (1 July 2011) [92].

<sup>742</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 11; Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 8.

<sup>743</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 11.

<sup>744</sup> Ibid.

<sup>745</sup> Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 8; Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 15.

<sup>746</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 13.

<sup>747</sup> Office of the Australian Information Commissioner, Submission No 17 (5 July 2011) 7.



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another level of litigation focusing on the form of the reasons rather than the substance of the decision. The Council considers that government agencies should be complying with the legal requirements in the *ADJR Act* as a matter of course, and that an additional provision implies that agencies might refuse a request for reasons arbitrarily.

9.73 However, the failure of an agency to provide a statement of reasons that complies with the requirements of s 13 is relevant to the question of costs in proceedings to seek an order that reasons are required under s 13(4A). The failure to provide adequate reasons is also potentially relevant to questions of costs in subsequent *ADJR Act* proceedings, if the applicant is put in a position where they need to make an application under the *ADJR Act* in the absence of an adequate statement of reasons. Therefore, the failure to comply with the duty to provide reasons on request should be a factor for a court determining costs at the conclusion of any proceedings under the *ADJR Act*. This approach is consistent with the High Court's decision in *Oshlack v Richmond River Council*,<sup>748</sup> where the High Court held that the public interest character of litigation is a relevant factor in a costs order. If necessary, this principle should be given effect by an amendment to the *ADJR Act*, the *Federal Magistrates Act 1999* (Cth) or the *Federal Court of Australia Act 1976* (Cth).

9.74 There are already a number of Acts which contain special costs rules for administrative law litigation. For example, Section 66 of the *FOI Act*, s 66 provides that where a person applies to the AAT for review of a decision of the Information Commissioner and is successful or substantially successful in the application, 'the Tribunal may, in its discretion, recommend to the responsible Minister that the costs of the applicant in relation to the proceedings be paid by the Commonwealth.' Section 67 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) provides that the AAT can order that:

- a responsible authority pays the applicant's costs if its decision is varied or remade in a manner more favourable to the claimant;<sup>749</sup>
- Comcare pays costs where the Commonwealth institutes proceedings and a decision is varied or remade in a manner favourable to the claimant;<sup>750</sup> and
- the Commonwealth pays costs where the Commonwealth institutes proceedings 'in any other case'.<sup>751</sup>

### Recommendation 13

The failure of an agency to provide a statement of reasons that complies with the requirements of s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be a factor that is taken into account by a court in making a costs order at the conclusion of proceedings under the Act.

<sup>748</sup> (1998) 193 CLR 72.

<sup>749</sup> *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 67(8).

<sup>750</sup> *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 67(8A)(a).

<sup>751</sup> *Ibid* s 67(8A)(b).

## EXEMPTIONS FROM THE OBLIGATION TO PROVIDE REASONS

### Summary

9.75 Schedules 1 and 2 were inserted into the *ADJR Act* by the *Administrative Decisions (Judicial Review) Amendment Act 1980*. The Schedules set up a dichotomy between the ambit of review under the Act and the ambit of the reasons requirement. In Report No 33 (1991), the Council considered exemptions from the right to request reasons, but was not formally consulted in the drafting of Schedule 2.<sup>752</sup>

9.76 In this chapter, the Council considers if there should be exemptions from a general obligation to provide reasons. In this context, the Council considers recommendations made in Report No 33 about ss 13(11) and 13A of the *ADJR Act*. The Council also outlines some of the general principles for exemptions from the obligation to provide reasons in s 13 of the *ADJR Act* and considers each of the current exemptions in Schedule 2 with reference to those principles in **Appendix C**.

### Exemption from a general obligation to provide reasons

9.77 The Consultation Paper asked whether there should be any exemptions from a *general* obligation to provide reasons, including the obligation in s 13 of the *ADJR Act*. This could be an exemption from the obligation to provide a statement of reasons or a general exemption from providing certain information in a statement of reasons, as in the current s 13A.

9.78 Section 13(11) provides that s 13 does not apply to the following decisions:

- (a) a decision in relation to which section 28 of the *Administrative Appeals Tribunal Act 1975* applies;
- (b) a decision that includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision; or
- (c) a decision included in any of the classes of decision set out in Schedule 2.

9.79 The rationale behind paragraphs (a) and (b) is that reasons have already been provided in these cases—s 28 of the *AAT Act* also provides for a right to request reasons. Schedule 2 contains a list of Acts and provisions which are, by operation of paragraph (c), exempt from s 13.

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<sup>752</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989); Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions*, Report No 33 (1991).

## Chapter 9: Reasons for Decisions

9.80 Section 13A currently provides that statements of reasons need not include:  
information that:

- (a) relates to the personal affairs or business affairs of a person, other than the person making the request; and
- (b) is information:
  - (i) that was supplied in confidence;
  - (ii) the publication of which would reveal a trade secret;
  - (iii) that was furnished in compliance with a duty imposed by an enactment; or
  - (iv) the furnishing of which in accordance with the request would be in contravention of an enactment, being an enactment that expressly imposes on the person to whom the request is made a duty not to divulge or communicate to any person, or to any person other than a person included in a prescribed class of persons, or except in prescribed circumstances, information of that kind.

9.81 If not providing the information would make the statement of reasons misleading, a statement does not have to be furnished.

9.82 Decisions not captured by the general exemptions may be exempt through the operation of a public interest certificate issued by the Attorney-General. Section 14 of the *ADJR Act* provides that information does not have to be disclosed in reasons:

if the Attorney-General certifies, by writing signed by him or her, that the disclosure of information concerning a specified matter would be contrary to the public interest:

- (a) by reason that it would prejudice the security, defence or international relations of Australia;
- (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
- (c) for any other reason specified in the certificate that could form the basis for a claim in a judicial proceeding that the information should not be disclosed.

9.83 In Report No 33, the Council considered that the administration of the statements of reasons should be as clear as possible on the face of the legislation. At that time, the Council disapproved of the dichotomy the schedules to the *ADJR Act* created between the ambit of judicial review under the Act and the scope of the obligation to provide reasons under s 13.

9.84 In Report No 33, the Council recommended repealing—with certain safeguards—the Schedule 2 exceptions to the obligation to provide a statement of reasons, as ‘the requirements of justice can be met only by ensuring that in every case where judicial review

under the *ADJR Act* is available there is also an entitlement to reasons'.<sup>753</sup> This is primarily because the availability of a statement of reasons is a de facto precondition to accessing judicial review—without it, the applicant is unlikely to be able to understand whether the decision was made lawfully.<sup>754</sup> The Council considered that, to the extent that reasons for or information relating to certain decisions should be protected from disclosure, the exemptions in ss 13A and 14 provide adequate protection.<sup>755</sup>

9.85 In making its recommendation for repeal of Schedule 2, the Council also conducted a review of the decisions listed in the schedule and made a number of recommendations for amendments to ss 13 and 13A. The effect of the recommendations would have been either to exclude certain broad categories of decisions from s 13 or to expand the categories of information that need not be disclosed as part of a s 13 statement of reasons.

9.86 Many submissions to this inquiry considered that it was necessary for certain types of decisions to be exempt from the requirement to provide reasons, and supported the ongoing use of Schedule 2 exemptions in the *ADJR Act*.<sup>756</sup> For example, the Ombudsman acknowledged that providing reasons in certain circumstances is problematic:

This includes circumstances where, for example, the provision of reasons might disclose information which could compromise confidentiality, or have adverse consequences for the protection of national security, law enforcements, public safety or commercially valuable administration.<sup>757</sup>

9.87 Only the ANEDO submitted that there should be no exemptions from the obligation to provide reasons, 'in the interests of accountability, transparency and robust decision making'.<sup>758</sup>

9.88 Stakeholders, for example the Law Council of Australia and NSW Young Lawyers, agreed that the Schedule 2 exemptions could be safely repealed. However, both organisations submitted that some decisions should be exempt from the requirement to provide reasons.<sup>759</sup> NSW Young Lawyers argued that the safeguards in ss 13A and 14 of the *ADJR Act* are adequate.<sup>760</sup>

9.89 The ACC submitted that an Attorney-General's certificate could be 'well adapted to discouraging ill-considered withholding of reasons on asserted public interest grounds in a context where such grounds will not commonly exist'.<sup>761</sup> However, the ACC noted that

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<sup>753</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions*, Report No 33 (1991) 47.

<sup>754</sup> Ibid 48.

<sup>755</sup> Ibid.

<sup>756</sup> Fair Work Ombudsman, Submission No 22 (1 July 2011) 1; Attorney-General's Department (Cth), Submission No 21 (9 August 2011) 10; Australian Crime Commission, Submission No 5 (6 July 2011) 12; Department of Defence, Submission No 4 (24 June 2011) 6; Commonwealth Ombudsman, Submission No 15 (8 July 2011) 7; Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 8. <sup>757</sup> Commonwealth Ombudsman, Submission No 15 (8 July 2011) 7.

<sup>758</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 8

<sup>759</sup> Law Council of Australia, Submission No 23 (1 July 2011) 15.

<sup>760</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 12.

<sup>761</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 10.

where a large proportion of an agency's decisions would need to rely on a certificate, it would be more appropriate to develop procedures similar to what is contained in the *FOI Act* to determine what material should be disclosed.<sup>762</sup>

## Exemptions for information

9.90 The Council considers that there is justification for both the exemption of particular decisions from the requirement to provide reasons on request and for general exemptions for particular types of information.

9.91 With regards to the exemption of particular classes of information, the Council considers that amending s 13A of the *ADJR Act* would not be without difficulty. Amendments to s 13A could potentially broaden exemptions from the right to request reasons.

9.92 In Report No 33, the Council recommended that s 13A should be amended to provide that the section applies in relation to any information to which a request under subsection 13(1) relates, being information which 'is personal information within the meaning of the *Privacy Act 1988* (Cth) and which that Act prevents the person to whom the request was made from disclosing,' and that which 'would, or could reasonably be expected to':<sup>763</sup>

- prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;
- disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of the law;
- endanger the life or physical safety of any person;
- prejudice the fair trial of a person or the impartial adjudication of a particular case;
- disclose lawful methods or procedures for preventing, detecting, investigating or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety; or

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<sup>762</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 10.

<sup>763</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions*, Report No 33 (1991) Recommendation 9.

- adversely affect an authority of the Commonwealth in respect of its competitive commercial activities.<sup>764</sup>

9.93 Another option was put forward in the OAIC's submission to the Council. The OAIC pointed to the exemptions to provide reasons in the *FOI Act*,<sup>765</sup> noting that:

Section 25(1) of the *FOI Act* restricts the general right to reasons by emphasising that the Act does not require disclosure of information relating to the existence or non-existence of a document if the inclusion of that information would make a document an exempt document under s 33 (documents affecting national security, defence or international relations) or s 37(1) (documents affecting law enforcement and protection of public safety).<sup>766</sup>

9.94 This approach would better align the information protection requirements in the *FOI Act* and the *ADJR Act*. Section 13A was enacted before the *FOI Act*, and this may explain the inconsistency between the two regimes for the protection of information.

9.95 The Council in Report No 33 also recommended that:

Subsection 13(11) ought to be amended to exclude from the definition of decision to which section 13 applies a decision the terms of which are required by an enactment to be laid before each House of the Parliament and a decision the terms of which are laid before each House of the Parliament pursuant to a power conferred by an enactment.<sup>767</sup>

This issue is now addressed in the *FOI Act*, which provides that access to a document can be deferred if the document is to be presented before Parliament.<sup>768</sup>

9.96 The categories of information the Council recommended in Report No 33 should not be required to be included in a statement of reasons provided on request under the *ADJR Act* are not consistent with the current regime in the *FOI Act*. The Council considers that consistency between the two systems for release of information is desirable.

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<sup>764</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions*, Report No 33 (1991) Recommendation 10.

<sup>765</sup> Office of the Australian Information Commissioner, Submission No 17 (5 July 2011) 6.

<sup>766</sup> Ibid.

<sup>767</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of reasons for decisions*, Report No 33 (1991) rec 19.

<sup>768</sup> *Freedom of Information Act 1982* (Cth) s 21.



**Recommendation 14**

The categories of information that are not required to be included in a statement of reasons under sections 13A(1) and 14(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be deleted and replaced by a provision stating that a statement of reasons is not required to contain:

- (a) any matter that is of such a nature that its inclusion in a document would cause that document to be an exempt document under the *Freedom of Information Act 1982* (Cth); or
- (b) the notice of or statement of reasons for a decision that is required by an enactment to be laid before either House of the Parliament, prior to the date on which that notice or statement of reasons is laid before a House of the Parliament.

**Principles justifying the exclusion of the *ADJR Act* obligation to provide a statement of reasons for decisions under particular Acts or provisions**

9.97 The Council considers that the list of specific exemptions in Schedule 2 should be retained, and has undertaken a review of Schedule 2 in consultation with relevant agencies. The comments provided have assisted the Council in developing a list of principles for consideration in determining whether a particular decision should be included in Schedule 2 and therefore exempt from the requirement to provide reasons.

9.98 The Council considers that decisions should be exempt from the obligation to provide a statement of reasons in the following circumstances:

- Where an alternative scheme for providing reasons for decisions exists which is as accessible and effective as the *ADJR Act* obligation. This would include decisions of Tribunals, where there is a statutory obligation to provide reasons for decisions or where reasons are made public by virtue of tabling. It would also include employment and appointment decisions.
- Where providing reasons for a decision has the potential to fragment or frustrate another legal process which is already underway. In the context of the requirement to give reasons, there are concerns about revealing information which might disclose sensitive operational information that could ‘tip off’ others or alert persons to a confidential source of information. There are other mechanisms to examine and test the legality of such decisions, such as through the court process.
- Where disclosure of any information would, or could reasonably be expected to, prejudice the ability of the Commonwealth Government or another body exercising power under a Commonwealth enactment to manage the Australian economy.

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- An example would be decisions of the Reserve Bank in connection with its banking operations (including individual open market operations and foreign exchange dealings).
- Where the requirement to provide reasons may involve significant workload implications.
- This consideration is raised in the context of the thousands of decisions related to employment in the public sector for which reasons would be available in most instances if requested. The concern about applying s 13 of the *ADJR Act* relates to the level of formality and detail required for statements of reasons for all such decisions. In addition, it is Commonwealth policy that the Australian Public Service should, as far as is possible, be covered by the same arrangements that apply in the workforce generally.

9.99 Specific exemptions are discussed in detail in **Appendix C**. The Council makes recommendations to amend Schedule 2, including to remove:

- exemptions for decisions under Acts that no longer exist;
- exemptions for decisions that should be exempt from the *ADJR Act* as a whole and included in Schedule 1; and
- exemptions that would otherwise be available under the non-disclosure provisions of s 13A.

# 10. REMEDIES

## Summary

10.1 As discussed in Chapter 3, the remedies available under the *Australian Constitution* and s 39B of the *Judiciary Act 1903* (Cth) (*Judiciary Act*) in relation to constitutional judicial review are similar in nature to those available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) for statutory judicial review. The primary difference is the need to show a ‘jurisdictional error’ to demonstrate an entitlement to the constitutional remedies.

10.2 The Consultation Paper only raised a few issues regarding remedies in judicial review proceedings. The first was whether it was appropriate for remedies only to issue where there was a jurisdictional error. The Consultation Paper also canvassed a recommendation by the Law Commission of England and Wales that damages should be available in judicial review proceedings. The Council has concluded that remedies should issue in relation to certain non-jurisdictional errors, and this is reflected in the Council’s model for review discussed in Chapter 4. The Council has not made a recommendation with respect to damages.

## STATUTORY AND CONSTITUTIONAL REMEDIES

10.3 The question of whether remedies should only issue where a jurisdictional error has been shown is central to the consideration of the ambit and model for review discussed in Chapters 4 and 5. The submissions to the Council on remedies did not focus on the question of whether remedies should only issue where there is a jurisdictional error. Rather, submissions addressed more broadly the question of statutory remedies versus constitutional writs.

10.4 Submissions broadly supported the current remedies in the *ADJR Act*, and their expression.<sup>769</sup> The Public Interest Advocacy Centre (PIAC) argued that the *ADJR Act* ‘simplifies the issue of remedies and removes the unhelpful common law distinction between jurisdictional and non-jurisdictional error’.<sup>770</sup> The Department of Immigration and Citizenship (DIAC) submitted that a statutory remedial scheme would assist clients by helping them to understand the remedies that are available in judicial review.<sup>771</sup> The Law Council of Australia stated that the discretion given to the Court in s 16 to refuse to grant a remedy is ‘workable and desirable’.<sup>772</sup>

10.5 Drs Peter Billings and Anthony Cassimatis suggested that there should be some amendments to remedies. They supported ‘codification of the discretionary grounds for

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<sup>769</sup> Law Council of Australia, Submission No 23 (1 July 2011) [116]; Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 8; Australian Crime Commission, Submission No 5 (6 July 2011) 10; Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 9.

<sup>770</sup> Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 9.

<sup>771</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 8.

<sup>772</sup> Law Council of Australia, Submission No 23 (1 July 2011) [115].

denial [of] relief in judicial review proceedings', for example judicial review should only be exercised as a remedy of last resort, after merits review options have been exhausted.<sup>773</sup>

10.6 Billings and Cassimatis argued that it was important for the Council to consider introducing a statutory duty on courts conducting judicial review 'to consider alternative judicial review remedies (with attendant powers to issue those remedies where appropriate) before dismissing a judicial review application on jurisdictional grounds'.<sup>774</sup> They noted that

one significant mischief of the traditional judicial review remedies identified by the Kerr and Ellicott Committees was the situation where an applicant's choice of one remedy led to dismissal of the claim on technical grounds that might have been avoided had a different remedy have been sought.<sup>775</sup>

10.7 They argued that 'this mischief has not disappeared and more could be done to avoid its occurrence'.<sup>776</sup> They point to rule 569 of the *Uniform Civil Procedure Rules* (Qld), which applies in cases where an application has been made for statutory judicial review and the court finds it has no jurisdiction to hear the matter under the *Judicial Review Act 1991* (Qld), but could have heard the matter if an application had been made for judicial review in the Supreme Court's inherent jurisdiction. Rule 569 allows the court to 'order the proceeding to continue as if it had been started as an application for review'. Billings and Cassimatis noted that this rule could have been relied on in *Griffith University v Tang*,<sup>777</sup> but was not, and as such argued that 'it may be appropriate to formulate an equivalent rule in mandatory terms'.<sup>778</sup>

10.8 The Council considers that the *ADJR Act* did address the issues raised by the Commonwealth Administrative Review Committee (Kerr Committee) and the Committee of Review of Prerogative Writ Procedures (Ellicott Committee) in terms of the flexibility of remedies, but notes the problem raised by Billings and Cassimatis when alternative review jurisdictions are available. The Council considers that its preferred recommendation would address this issue, without the need for a provision similar to rule 569 of the *Uniform Civil Procedure Rules* (Qld). The Council also supports the maintenance of clear remedies expressed in plain language, which are not restricted to jurisdictional error.

## DAMAGES

10.9 The 2008 consultation paper released by the Law Commission of England and Wales (the Law Commission), *Administrative Redress: Public Bodies and the Citizen*,<sup>779</sup> proposed the creation of a damages remedy as an ancillary remedy to be claimed alongside the prerogative writs available at common law, or for private law claims against public bodies. The Law Commission considered that such a remedy would fill a gap in the current law, as damages

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<sup>773</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 16.

<sup>774</sup> Ibid.

<sup>775</sup> Ibid.

<sup>776</sup> Ibid.

<sup>777</sup> 221 CLR 99.

<sup>778</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 16.

<sup>779</sup> Law Commission (UK) *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187 (2008).

## Chapter 10: Remedies

can only be claimed against a public body where there is a private law right to damages, where there has been a breach of a European Union law or under the *Human Rights Act 1998* (UK).

10.10 The Law Commission proposed, in relation to judicial review, that courts could grant a claimant damages if the claimant could show that:

- the legal regime in which the public body acted was intended to confer a benefit on individuals and the harm suffered by the individual was of a similar nature to the benefit that the regime conferred;<sup>780</sup>
- the public body had committed a ‘serious fault’—it fell far below the standard expected in the circumstances;<sup>781</sup> and
- the defendant’s conduct did in fact result in the damage complained of and the damage is not, in law, too remote a consequence of the defendant’s wrongdoing.<sup>782</sup>

10.11 The Law Commission suggested a number of factors that might indicate there had been a serious fault, such as:

- the risk or likelihood of harm involved in the conduct of the public body;
- the seriousness of the harm caused;
- the knowledge of the public body, at the time that the harm occurred that its conduct could cause harm, and whether it knew or should have known about vulnerable potential victims;
- the cost and practicability of avoiding the harm;
- the social utility of the activity in which the public body was engaged when it caused the harm—this would include factors such as preventing an undue administrative burden on the public body;
- the extent and duration of departures from well-established good practice; and
- the extent to which senior administrators had made possible, or facilitated, the failure or failures in question.<sup>783</sup>

10.12 The Law Commission also asked for views on whether the discretionary nature of the prerogative writs should be retained for the damages remedy. Some responses to the Law Commission’s consultation paper supported this position.

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<sup>780</sup> Law Commission (UK) *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187 (2008) 83.

<sup>781</sup> Ibid 85.

<sup>782</sup> Ibid 86.

<sup>783</sup> Ibid 85.

10.13 However, there was substantial opposition, particularly from government bodies, to both the public law and private law aspects of the proposal to allow damages for serious fault.<sup>784</sup> The main criticisms of the proposal were that:

- monetary remedies were inconsistent with the nature of public law;<sup>785</sup>
- there was a risk of increased delays to judicial review proceedings;<sup>786</sup> and
- providing for damages would place an increased financial burden on public authorities.<sup>787</sup>

10.14 In its final report, the Law Commission noted that there was a lack of available data on the compensation liability of public bodies to enable assessment of potential benefits from the proposed reforms. The Law Commission considered that there was no evidence available to support or refute criticisms of the proposal. Therefore, while the Law Commission considered that the proposals had merit, it decided not to pursue them any further.

10.15 The Law Commission argued that in some cases damages were necessary to avoid injustice to individuals, for example where a licence had been revoked invalidly and a person had lost earnings as a result.<sup>788</sup> The Law Commission considered that sometimes damages were appropriate in the interests of justice in individual cases, and to improve government service delivery.<sup>789</sup>

10.16 Damages in Australia, as in the United Kingdom, are available in a private law action based on contractual relationships or tort action for negligence, breach of statutory duty or misfeasance in public office.<sup>790</sup> In Australia, the injustices which the Law Commission sought to address may be compensated through other schemes that are not dependent upon a finding of legal error in a decision making process. The Government has the discretion to make compensation payments, either in the form of payments under the Compensation for Detriment caused by Defective Administration scheme (CDDA) or ‘act of grace’ payments, to people adversely affected by government administration.<sup>791</sup> These discretionary compensation schemes are available where there may have been defective administration or where government administration has inequitable consequences for a particular individual. Compensation under these schemes is often granted where no other remedies are available. As a result, discretionary compensation will not usually be available in conjunction with judicial review remedies. The Law Commission’s proposal sought to have damages available as an ancillary remedy in judicial review proceedings.

10.17 A major concern with providing for the courts to grant damages as a judicial review remedy allied to a finding of unlawful administrative action would be that the court either

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<sup>784</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Report No 332 (2010) 2.

<sup>785</sup> Ibid 8–9.

<sup>786</sup> Ibid 10.

<sup>787</sup> Ibid 10–11.

<sup>788</sup> Ibid 15.

<sup>789</sup> Ibid 22.

<sup>790</sup> See Chapter 2.

<sup>791</sup> See Chapter 2.



## Chapter 10: Remedies

was, or would appear to be, deciding the correctness of the decision on the merits. In Australian judicial review proceedings, a court can decide whether a decision maker has made an error of law, but not what the correct decision should have been. The Law Commission's criteria require assessments of the seriousness of harm caused to individuals and the causal relationship between the decision of the government body and that harm. An assessment of that kind could embrace an assessment of the merits of particular administrative action.

10.18 The Law Council of Australia discussed the issue of damages in judicial review at length. They argued that s 16(d) of the *ADJR Act* is broad enough to allow courts to grant an award of damages; however they noted the High Court in *Park Ob Ho v Minister for Immigration and Ethnic Affairs*<sup>792</sup> has not interpreted it in that way. They submitted that s 16 of the *ADJR Act* should be amended to include the following:

If a decision, conduct, act or omission breaches one of the grounds of review in this Act, and results from negligent performance or non-performance, and a person suffers loss or damage as a direct result, then the Court may award damages for any economic loss so caused.<sup>793</sup>

10.19 The Law Council argued, however, against an 'overarching' remedy for damages:

It would be contrary to the development of orthodox principles to create an overarching damages remedy which does not take account of the particular statutory intention and, importantly, broader public policy reasons which tend against imposing a general liability to damages where administrative action may be taken in error (but not where there is a duty of care in negligence).<sup>794</sup>

10.20 The Law Council noted that Australian courts have consistently rejected the notion of an administrative tort.<sup>795</sup> In their submission, the Australian cases demonstrate that there is appropriate relief from negligent administrative action when a duty of care can be made out.<sup>796</sup>

10.21 The Law Council of Australia submitted that schemes, such as CDDA, ex gratia and act of grace payments make, in effect, awards of damages in cases of defective administrative decision making. Because of this, the Law Council argued that the schemes should be subject to judicial review to avoid inconsistent application of discretionary principles flowing from terms such as 'defective' and 'detriment', although they expressed concern at the justiciability of the CDDA 'given that it has its basis in moral rather than legal obligation'.<sup>797</sup>

10.22 The Council notes that this proposal raises issues going beyond this report which would require specific attention, and which may be appropriate for further consideration in the future.

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<sup>792</sup> (1989) 167 CLR 637.

<sup>793</sup> Law Council of Australia, Submission No 23 (1 July 2011) [120].

<sup>794</sup> Ibid [138].

<sup>795</sup> Ibid [123], citing *New South Wales v Paige* [2002] NSWCA 235; *Bienke v Minister for Primary Industries and Energy* (1996) 135 ALR 128; *Macksville & District Hospital v Mayze* (1994) 125 ALR 151, 724–25, 732.

<sup>796</sup> Law Council of Australia, Submission No 23 (1 July 2011) [138].

<sup>797</sup> Ibid [141].

# 11. COURT PROCEDURES

## SUMMARY

11.1 Any reform of judicial review requires consideration of the courts and the processes that apply to judicial review applications. While judicial review focuses on addressing an individual grievance, court procedures and other non-legal mechanisms can be utilised to ensure that grievances are being resolved in the most effective and appropriate manner.

11.2 The Consultation Paper considered the streamlining procedures that apply in relation to judicial review applications under the *Migration Act 1958* (Cth) (*Migration Act*), however the wider roles played by the Federal Court and Federal Magistrates Court in judicial review applications were not considered. In this Chapter, the Council considers measures the courts can take to ensure the processes for considering judicial review applications are efficient. The Council conducted further consultations with the Federal Court and Federal Magistrates Court following the publication of the Consultation Paper, focusing on the courts' existing powers to manage cases. The Council does not consider that any recommendations to change court procedures specifically in relation to judicial review applications are warranted given the courts' existing powers to manage cases.

11.3 In this chapter, the Council also considers the appropriateness of adopting streamlining measures used in the migration jurisdiction, public interest and costs in judicial review litigation, and the issues raised by the principle established in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*<sup>798</sup> (the 'Hardiman principle')—that decision-making tribunals should not contest applications for review of their decisions.

11.4 Stakeholders generally did not support adopting procedures used in the migration jurisdiction to apply to judicial review applications. Few stakeholders made a submission about costs in judicial review proceedings. As noted above, the Council considers the federal courts already have extensive powers to deal with cases effectively, including sufficient discretion to make orders as to costs, and does not consider that any improvements could be made to current court procedures.

## ROLE OF FEDERAL COURT AND FEDERAL MAGISTRATES COURT

11.5 Both the Federal Court and the Federal Magistrates Court have an interest in ensuring that applications for judicial review are made appropriately and that the processes for hearing matters are efficient. The measures that the federal courts can take include:

- ensuring that matters are heard by judges with relevant expertise;
- making information about judicial review available on websites and in forms;

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<sup>798</sup>

(1980) 144 CLR 13.

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- developing accessible court forms; and
- streamlined procedures.

11.6 Streamlined procedures aim to minimise delays in the litigation process and reduce time spent dealing with unmeritorious litigation. The Consultation Paper discussed streamlining procedures specifically and these are discussed separately below.

### Expertise of judges

11.7 The Federal Magistrates Court has two main divisions:

- General Division—covering administrative law, admiralty law, bankruptcy, copyright, human rights, industrial law, migration, privacy and trade practices, family law and child support; and
- Fair Work Division—as established by the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

11.8 The Federal Magistrates Court has established specialist panels, including an administrative law panel. The establishment of panels in its specialist jurisdictions are an important development of the Court. The Court believes that the panel system best enables it to use its judicial resources effectively according to its jurisdictions.<sup>799</sup>

11.9 The administrative law panel includes:

- all appeals transferred from the Federal Court to the Federal Magistrates Court from non-presidential members of the Administrative Appeals Tribunal (AAT) and all applications under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*); and
- most first instance judicial reviews of visa-related decisions under the *Migration Act*.

11.10 The Court submitted that the panels provide an opportunity for members to develop and maintain expertise in the jurisdictional areas allotted. The Court advised that the panels have been established in order to ensure that work is handled by Federal Magistrates with expertise in the area and with a commitment to allocating appropriate priority to the cases assigned to them. The Court also advised that diary rules are intended to ensure that cases in these jurisdictions will be dealt with generally within a target time frame of six months after filing.

11.11 The Federal Court uses an Individual Docket System to allocate and manage cases. Under this system, a matter will usually stay with the same judge from commencement until disposition. This means a judge has greater familiarity with each case and leads to the more efficient management of the proceeding.<sup>800</sup> The New South Wales, Victorian and Queensland

<sup>799</sup> Federal Magistrates Court of Australia, *Annual Report 2010–11* (Commonwealth of Australia, 2011) 28.

<sup>800</sup> Federal Court of Australia, *Annual Report 2010–11* (Commonwealth of Australia, 2011) 25.

registries of the Federal Court also have established subject matter panels. A proceeding involving a panel matter will be allocated to a judge who is a member of the relevant panel. Administrative law does not have a specific subject matter panel.

## **Information about judicial review**

11.12 In general, both the Federal Court and the Federal Magistrates Court have detailed information on their websites about making an application for judicial review. The information provided by the Federal Magistrates Court on administrative law refers to the Court's jurisdiction under the *ADJR Act*, including a list of grounds for applying. The Court also refers to appeals from the Administrative Appeals Tribunal under s 44 of the *ADJR Act* on questions of law which have been remitted from the Federal Court. There is a detailed fact sheet on review of decisions under the *Migration Act*, including the basis on which judicial review can be sought (limited to occasions when there has been a jurisdictional error).

## **Court forms**

11.13 One way that the federal courts can ensure that applications for judicial review are made appropriately is through the design of forms. The Federal Court altered its forms in August 2011, which has raised new issues in relation to applications under the *ADJR Act*. For judicial review matters, the Federal Court and Federal Magistrates Court both use Form 66 under Rule 31.01(1) of the *Federal Court Rules 2011*. The form itself is described as an 'originating application for judicial review', but does not specifically mention the *ADJR Act*. For example, where the form asks for grounds of review, it does not state that the grounds are listed in s 5 of the *ADJR Act*.

11.14 Form 69 is used for originating applications for relief under s 39B of the *Judiciary Act 1903* (Cth) (*Judiciary Act*) in the Federal Court. It provides for a statement of the relief sought, but the grounds of review are contained in accompanying documents such as the statement of claim or affidavit. The *Judiciary Act* does not confer jurisdiction on the Federal Magistrates Court in relation to judicial review, therefore this form is not relevant for judicial review applications filed in the Federal Magistrates Court.

11.15 A different form is used for judicial review of migration decisions. The relevant form provides information about seeking review of migration decisions and contains a description of the available remedies and information about how to describe the grounds for the application.

11.16 In consultations with the Council, the Federal Court submitted that the new forms, implemented under the new *Federal Court Rules 2011* from 1 August 2011, are cross-referenced to the particular Court Rules relevant to the form and contain instructions to assist the user when completing the form. It is intended that the Court Rules will be read in conjunction with the forms. The Court submitted that Form 66 can be used in two ways, either to start a proceeding for judicial review under the *ADJR Act*, or for an application under the *ADJR Act* which is joined with an application for relief under s 39B of the *Judiciary Act* that arises out of

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or relates to, or is connected with, the same subject matter. For this reason, the Court indicated that a specific reference in the form to the *ADJR Act* could confuse users intending to use the form to claim relief under both legislative bases. It was also felt that any user reading Rule 31.01 in conjunction with the form would not be aided by a further reference to the legislation on the form.

11.17 The Court indicated that the forms should not be changed until sufficient time has elapsed to enable users to become familiar with the new *Federal Court Rules 2011* and the approved forms.

### Adequate direction to users of the courts

11.18 The panel system established in the Federal Magistrates Court provides a twofold benefit in specialist jurisdictions in allowing for Magistrates with relevant expertise to hear matters as well as ensuring that timeframes are managed. The Individual Docket System in the Federal Court also ensures that judges are familiar with their cases.

11.19 The information on the Federal Magistrates Court's website about judicial review is very detailed in relation to migration matters. The information on applications under the *ADJR Act* is also sufficiently detailed considering the number of non-migration administrative law matters filed in the Federal Magistrates Court is very low (according to the Annual Report of the Federal Magistrates Court, 15 administrative law matters were filed compared with 959 migration matters).<sup>801</sup>

11.20 Although the court forms used in judicial review applications do not specifically mention the enumerated grounds in s 5 of the *ADJR Act*, the Council considers that the forms, when read in conjunction with the *Federal Court Rules 2011*, give adequate directions to users.

### STREAMLINED PROCEDURES

11.21 The Consultation Paper asked if it would be beneficial to extend the streamlining measures used in the migration jurisdiction to all avenues of judicial review.

11.22 Appeals from the Federal Magistrates Court can already be heard by a single judge of the Federal Court. Procedures in the *Migration Act* that are also intended to streamline the migration jurisdiction include:

- an obligation not to encourage litigation proceedings where there are no reasonable prospects of success;<sup>802</sup>
- the ability for the court to make a personal costs order against a person who encourages unmeritorious litigation;<sup>803</sup>

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<sup>801</sup> Federal Magistrates Court of Australia, *Annual Report 2010–11* (Commonwealth of Australia, 2011) 26.

<sup>802</sup> *Migration Act 1958* (Cth) s 486E.

<sup>803</sup> *Ibid* s 486F.

- a requirement that any lawyer filing a document to commence migration litigation certify that there are reasonable prospects of success;<sup>804</sup> and
- a requirement for applicants to disclose any previous applications for judicial review of the same migration decision.<sup>805</sup>

11.23 Other procedural reforms raised in the Consultation Paper included strengthening the Court's discretion to dismiss proceedings, introducing a 'leave to proceed requirement' and time limits.

## **Streamlined proceedings**

11.24 Stakeholders generally did not support adopting procedures used in the migration context to streamline judicial review matters.<sup>806</sup> Drs Billings and Cassimatis submitted that the migration reforms to court procedures were based upon 'a false premise': 'that rising numbers of judicial review applicants indicated that they (and their lawyers) were inappropriately using the judicial process to extend the applicant's time in Australia'.<sup>807</sup> They argued that any reforms to streamlining measures should be evidence-based and focused on the 'possible structural causes, (such as the adequacy of legal aid funding) rather than simply the effects', as 'part of an overall strategy'.<sup>808</sup>

11.25 NSW Young Lawyers gave qualified support to the proposal to extend the requirement for compulsory disclosure of previous judicial review applications.<sup>809</sup> The Australian Tax Office (ATO) supported improvements to case management, particularly encouraging early identification of facts and issues in dispute.<sup>810</sup> The ATO noted the Federal Court's Practice Note<sup>811</sup> about tax and the Fast Track process in the Federal Court as examples of 'efficient case management', encouraging issues in dispute to be discussed at an early stage of the litigation.<sup>812</sup>

11.26 Overall, the Council considers that there is no need to extend the streamlining measures in the migration jurisdiction to other judicial review proceedings. There are small numbers of judicial review applications, and there is therefore no evidence that such measures would be beneficial for the courts, and they may be disadvantageous for applicants.

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<sup>804</sup> *Migration Act 1958* (Cth) s 486I.

<sup>805</sup> *Ibid* s 486D.

<sup>806</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 17; Victoria Legal Aid, Submission No 14 (7 July 2011) 5; Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 9.

<sup>807</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 17.

<sup>808</sup> *Ibid*.

<sup>809</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 14.

<sup>810</sup> Australian Taxation Office, Submission No 13 (1 July 2011) [33].

<sup>811</sup> Federal Court of Australia, *Practice Note TAX 1 of 2011—Tax list*, 1 August 2011.

<sup>812</sup> Australian Taxation Office, Submission No 13 (1 July 2011) [34]–[35].



## Courts' discretion to dismiss proceedings

11.27 There have been attempts to strengthen the discretion of the Federal Court not to hear judicial review applications at an early stage where alternatives to judicial review exist. The *Administrative Decisions (Judicial Review) Amendment Bill 1986* (Cth) sought to amend the *ADJR Act* to restrict the right to seek the review of administrative decisions by:

- altering the statutory provisions enabling the Federal Court to dismiss an application for review where alternative remedies are available; and
- requiring the Federal Court to consider whether it should exercise its discretion to dismiss applications at the earliest opportunity.

11.28 The Bill would have provided for the near automatic refusal of relief under the *ADJR Act* where there were either alternate means of review, or where the proceeding challenged was not complete, unless the applicant satisfied the court that the interests of justice required otherwise.

11.29 The Explanatory Memorandum suggested that the aim was to reduce delay and increase administrative efficiency, as proceedings were increasingly fragmented by interlocutory *ADJR Act* applications. In its report on the Bill, the Senate Legal and Constitutional Affairs Committee noted the problems caused by significant amounts of litigation relating to the decision regarding allocation of television licenses in Perth.<sup>813</sup>

11.30 In considering the Bill, the Senate Committee recognised that applicants should be encouraged to use merits review before judicial review. However, it did not wish to recommend restricting judicial review for all applicants because of a few unmeritorious or vexatious cases. The Senate Committee recommended that the Bill not be enacted and it was ultimately not passed by the Parliament.

11.31 Under s 31A of the *Federal Court of Australia Act 1976* (Cth), the Court can give summary judgment if it considers that a party has no reasonable prospect of successfully prosecuting or defending a proceeding.

11.32 Stakeholders did not consider that strengthening the discretion of the Federal Court and the Federal Magistrates Court to dismiss proceedings would be an effective streamlining measure of judicial review proceedings.<sup>814</sup> However, Billings and Cassimatis supported 'efforts to codify the discretionary grounds for dismissing judicial review proceedings, particularly in the light of existing merits review options'.<sup>815</sup> The Department of Immigration and Citizenship (DIAC) submitted that, in their experience, requiring Courts to exercise their discretion to dismiss applications at the earliest opportunity may not result in large number of applications dismissed. DIAC submitted that the Court has wide powers in the migration

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<sup>813</sup> Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Administrative Decisions (Judicial Review) Amendment Bill 1986* (1987).

<sup>814</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 17; Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 8; The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 15.

<sup>815</sup> Peter Billings and Anthony Cassimatis, Submission No 6 (27 June 2011) 17.

context to give orders and directions at the first court date to proceed to an immediate ‘show cause hearing’ under Rule 44.12 of the *Federal Magistrates Court Rules*.<sup>816</sup> DIAC noted the Court has rarely utilised show cause hearings.

11.33 The Council considers that the experience in the migration jurisdiction demonstrates that strengthening the courts’ power to dismiss proceedings is unlikely to be effective. The Council also considers that codifying the discretionary grounds for dismissing judicial review proceedings are unlikely to alter the courts’ approach to these matters, and may unnecessarily fetter the courts’ discretion.

## **Leave to proceed**

11.34 In the United Kingdom, a person needs ‘permission’ to apply for judicial review.<sup>817</sup> Judicial review is considered a remedy of last resort, and the permission stage is designed to filter out those claims that have no prospect of success. Parties are expected to have exhausted all other remedies before commencing a claim—including alternative remedies such as statutory appeals and appeals to relevant tribunals. A judge in the Administrative Court will consider the claim on the papers.<sup>818</sup> If permission is granted, the matter will go to a full hearing. There is also a pre-action protocol, designed to allow parties to avoid litigation.

11.35 While federal courts in Australia currently have a wide discretion to dismiss applications in judicial review proceedings, a further obligation could be placed on the courts requiring them to consider whether an application should be dismissed without an application from the parties involved.

11.36 Given the significance of the courts’ supervisory jurisdiction in judicial review matters, leave requirements are unlikely to have much of an effect. Leave requirements could raise natural justice considerations if someone could have an application dismissed without a hearing to specifically address this issue. The alternate options could be:

- to give a hearing on the leave to proceed issue, which would defeat its purpose of saving time and resources; or
- to accept that unhappy applicants would frequently appeal dismissals, which might simply create more appeal work.

11.37 Experience in the migration jurisdiction tends to suggest that judges are likely to give leave to proceed even if no error is demonstrated in the original application, in case a real issue emerges at a later time. This is also borne out in the English experience of a leave to

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<sup>816</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 9.

<sup>817</sup> United Kingdom procedure which governs making a claim for judicial review is set out in the *Civil Procedure Rules* (UK) part 54.

<sup>818</sup> If the judge refuses permission, the claimant is entitled to seek (within seven days) that the matter be reconsidered at an oral hearing, see *Civil Procedure Rules* (UK) r 54.12. If at the oral hearing the judge again refuses permission, the claimant will have a right to apply for permission to appeal to the Court of Appeal against that refusal pursuant to Rule 52.15.

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proceed requirement as examined by Andrew Le Sueur and Maurice Sunkin.<sup>819</sup> Although the authors' research is almost 20 years old, the article made some useful findings. One was that 37% of applications were refused permission. But of those that were re-filed, 40% obtained permission.

11.38 The authors thought these statistics suggested a high degree of error in decisions *not* to grant permission. They also found that there was a range of reasons for refusal of permission (such as delay, no standing, no arguable case, or where judicial review was found not to be the correct remedy). The article also found that many cases were dismissed because they were thought unarguable. However, there was no clear definition of 'unarguable' and many cases found to be unarguable were later pursued, and won.

11.39 The English example is complicated by Civil Procedure Rule 54.4, which does not specify the criteria to grant permission (and, by implication, the criteria to refuse permission). If a requirement for permission does not have clear criteria, its value, above more general existing powers to dismiss claims that lack merit, is somewhat unclear.

11.40 DIAC noted that a requirement to seek 'permission' to apply for judicial review could assist the courts to vet unmeritorious judicial review applications. However, DIAC expressed concern that if a requirement to seek permission was introduced, it may add an additional procedural layer to litigation with no benefits or increased efficiencies.<sup>820</sup>

11.41 NSW Young Lawyers submitted that it is untenable in the Australian context to require applicants to obtain permission to seek judicial review. They argued that:

any attempt to require permissions for review applications under the *ADJR Act* or common law would simply prompt unsuccessful applicants to make applications under s 75(v) of the *Constitution* following the High Court's decision in *Bodruddaza v Minister for Immigration and Multicultural Affairs* [228 CLR 651].<sup>821</sup>

11.42 Given the small number of judicial review applications and the availability of alternative paths of review under constitutional judicial review, the Council considers that there is no merit in requiring leave to proceed under the *ADJR Act*.

### Time limits

11.43 Time limits encourage litigation to proceed in a timely way, and discourage repeat litigation. Current time limits under the *ADJR Act* are more flexible than those under the *Migration Act*, because the court has more discretion as to when it may entertain an application for extension of time.

11.44 An aggrieved person has 28 days from receipt of the decision to commence Federal Court proceedings under s 11 of the *ADJR Act*. The Federal Court may extend this time limit

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<sup>819</sup> Andrew Le Sueur and Maurice Sunkin, 'Applications for Judicial Review: The Requirement of Leave' [1992] *Public Law* 102.

<sup>820</sup> Department of Immigration and Citizenship, Submission No 11 (1 July 2011) 8.

<sup>821</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 15.

in appropriate cases. The principles governing time limits under the *ADJR Act* have also been fairly well settled through a long line of cases on the point.<sup>822</sup>

11.45 The use of time limits as a specific streamlining measure was not widely discussed by stakeholders. NSW Young Lawyers and the Australian Network of Environmental Defenders Offices (ANEDO) did not support the use of time limits.<sup>823</sup> The ANEDO expressed concerns at the existing time limits currently required under s 11 of the *ADJR Act* and submitted that the complexities involved in environmental litigation meant 28 days is often not sufficient.<sup>824</sup> The ANEDO would therefore support an extension of the prescribed period for applications for an order of review in cases of public interest litigation.

11.46 The Council considers that the 28 day limit encourages prompt applications for review, and that there are other methods for dealing with complex matters once a proceeding has commenced.

### **Pre-trial consideration on the papers**

11.47 Only NSW Young Lawyers suggested that a pre-trial consideration of an application on the papers warrants further consideration.<sup>825</sup> The Council considers it is not a measure which should apply only in relation to judicial review proceedings, separate to other proceedings commenced in the federal courts.

## **PUBLIC INTEREST AND COSTS IN JUDICIAL REVIEW**

11.48 In Chapter 8, the Council considered public interest in judicial review in relation to the requirements of standing. The Council made a recommendation to facilitate public interest groups making judicial review applications. However, the public interest advocacy groups Public Interest Advocacy Centre Ltd (PIAC) and the ANEDO raised the issue of costs in judicial review litigation.

11.49 The accessibility of judicial review in public interest matters may be compromised by the potential for adverse costs orders against applicants when they are unsuccessful. Rule 40.51 of the *Federal Court Rules 2011* provides that the Court may, by order made at a directions hearing, specify the maximum costs that can be recovered on a party and party basis.

11.50 PIAC and the ANEDO both submitted that adverse costs orders can potentially inhibit public interest litigation.<sup>826</sup>

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<sup>822</sup> The rules governing time limits under the *ADJR Act* are explained in Enid Campbell and Matthew Groves, 'Time Limitations in Applications for Judicial Review' (2004) 32 *Federal Law Review* 29.

<sup>823</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 14; Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 9.

<sup>824</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 9.

<sup>825</sup> The Law Society of New South Wales Young Lawyers, Submission No 7 (1 July 2011) 14.

<sup>826</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 7; Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 6.

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11.51 In its submission, PIAC raised the following two suggestions about costs:

- the *ADJR Act* should include a provision that specifically allows the federal courts to make orders that protect litigants bringing an action in the public interest from an adverse costs order;<sup>827</sup> or
- the application of Order 62A of the superseded *Federal Court Rules* (now Rule 40.51 under the *Federal Court Rules 2011*) should be strengthened so that there is a presumption in favour of limiting costs in ‘public interest’ matters, where ‘public interest’ is defined broadly to include all cases that could benefit a class of disadvantaged people, even though they may benefit the applicant as well.<sup>828</sup>

11.52 The ANEDO submitted that federal courts should be given the discretion to grant ‘no costs’ orders to public litigants.<sup>829</sup> They submitted an alternative would be the adoption of s 49 of the *Judicial Review Act 1991* (Qld), which provides for ‘own costs’ orders, where parties only bear their own costs regardless of the outcome of the proceedings.<sup>830</sup>

11.53 The courts’ existing discretion to cap costs in accordance with Rule 40.51 would only be exercised where the order is sought by the applicant and where the court decides to exercise its discretion to make a capping order. Effectively, the ANEDO and PIAC were seeking that capping of costs should be presumed to apply in all cases that could benefit a class of disadvantaged people (presumably test cases).

11.54 The Council notes the concerns expressed by the ANEDO, that ‘the threat of adverse costs orders is one of the greatest deterrents to litigants seeking to bring public interest proceedings’.<sup>831</sup> While some argue that the use of presumptions of costs to protect public interest litigants could operate to fetter courts’ existing discretion, the Council agrees that judicial review requires particular protection for public interest litigants. The Council also considers that a presumption that parties bear their own costs reflects an approach now routinely applied in the administrative law context, including in tribunal decision making.

### Recommendation 15

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) should provide that, unless the court orders otherwise, parties to a judicial review proceeding should bear their own costs.

## THE *HARDIMAN* PRINCIPLE

11.55 The *Hardiman* principle was not considered in the Consultation Paper, but was raised during consultations subsequently conducted by the Council. The Council has considered the

<sup>827</sup> Public Interest Advocacy Centre Ltd, Submission No 18 (14 July 2011) 6.

<sup>828</sup> Ibid 7.

<sup>829</sup> Australian Network of Environmental Defenders Offices, Submission No 9 (1 July 2011) 7.

<sup>830</sup> Ibid.

<sup>831</sup> Ibid, 8.

principle as part of this Report. The effect of the principle is that, in certain circumstances, a decision maker cannot appear as a contradictor in proceedings challenging its own decision.

11.56 In the case of *R v Australian Broadcasting Tribunal; Ex parte Hardiman (Hardiman)*,<sup>832</sup> the High Court held that, in general, decision-making tribunals should not contest applications for review of their decisions. In some cases tribunals might make submissions limited to the powers and procedures of the tribunal.

11.57 Concerns were expressed during consultations that the *Hardiman* principle has expanded in recent times, and that the scope of its application has become unclear. It was noted that a matter of public law can be litigated between two private parties who may not necessarily have the public interest as their main concern. Section 18 of the *ADJR Act*, which allows the Attorney-General to intervene in the public interest, is rarely used, which means the public interest may not be represented in important public law matters. The courts have not given the Commonwealth clear guidance on the issue.

## The role of agencies in judicial review proceedings

11.58 The lack of clarity about the application of *Hardiman* is in relation to two issues:

- which decision makers are subject to the rule; and
- to what proceedings does the rule apply.

11.59 The High Court in *Hardiman* indicated that the rule only applied to tribunals in the nature of court substitutes, exercising adjudicatory functions *inter partes*.<sup>833</sup> There was a particular concern in these cases that tribunals maintain the appearance of impartiality, particularly if a decision was to be remitted. However, there have been a number of recent cases extending the rule in *Hardiman* to tribunals exercising regulatory functions and to administrative decision makers.<sup>834</sup>

11.60 On the other hand, there are many cases in which administrative decision makers do act as contradictors—migration and tax matters are two examples. In two recent cases, the Federal Court has suggested that the *Hardiman* principle could apply to administrative decision makers in matters before the AAT.<sup>835</sup> However, a recent Victorian Court of Appeal case criticised an administrative decision maker for not appearing as a contradictor in Victorian Civil and Administrative Tribunal proceedings, on the basis that the decision maker was the only party governed exclusively by the aims and objectives of the statutory scheme, rather than self interest.<sup>836</sup>

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<sup>832</sup> (1980) 144 CLR 13.

<sup>833</sup> Ibid.

<sup>834</sup> *TXU Electricity Ltd v Office of the Regulator-General* (2001) 3 VR 93; *Community Television Sydney Ltd v Australian Broadcasting Authority (No 2)* (2004) 136 FCR 338.

<sup>835</sup> *Geographical Indications Committee v O'Connor* (2002) 64 ALD 325; *Capricornia Credit Union Ltd v Australian Securities and Investments Commission (No 2)* [2007] FCAFC 112.

<sup>836</sup> *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 422.



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11.61 Associate Professor Matthew Groves has suggested that five areas of exception to the *Hardiman* principle can be regarded as reasonably well settled:

- where there is no active contradictor;
- no real possibility of remittal;
- questions arise on the powers and procedures of tribunals;
- in relation to investigative bodies; and
- where the rule has been abrogated by statute.<sup>837</sup>

11.62 Groves argues that the *Hardiman* principle is one of wide application, yet at the same time, subject to a great number of exceptions that have developed on an ad hoc basis. Unfortunately, the increasing number of exceptions has not been accompanied by a logical reconsideration of the wider implications of the rule and whether it should be retained.<sup>838</sup>

11.63 In a 2012 article, Nicholas Gouliaditis suggests that two areas of *Hardiman* could be subject to reform:

First, it could be made clear that the *Hardiman* principle does not apply to proceedings before merits review tribunals (or to primary decision-makers in subsequent judicial review applications), especially the AAT ... Secondly, there would be significant benefits if the *Hardiman* principle were modified to permit decision-makers to present ‘neutral’ submissions on jurisdiction in all instances (rather than simply in ‘exception cases’), without necessarily displacing the convention that the tribunal not be subject to a costs order regardless of the outcome. This appears to be how *Hardiman* is (incorrectly) presently applied in many cases without harm. The benefits of such participation have long been recognised and the risk of an appearance of bias in such circumstances must be low.<sup>839</sup>

11.64 Gouliaditis goes on to suggest that the overall justification for the *Hardiman* principle should be revisited:

Although explained as a rule designed to prevent decision-makers from compromising their partiality in judicial review proceedings, it may be more satisfactory if the *Hardiman* principle was viewed as one based on the perception of what is appropriate—that is, on the basis that it is unseemly for some bodies to become actively involved in defending their decisions having regard to their status.<sup>840</sup>

11.65 On this basis, Gouliaditis suggests that ‘the principle would largely be confined to tribunals in the nature of court substitutes’ and would not apply to other administrative

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<sup>837</sup> Mathew Groves, ‘The *Hardiman* Rule’ (2012) 33(2) *Adelaide Law Review* (forthcoming).

<sup>838</sup> Ibid.

<sup>839</sup> Nicholas Gouliaditis, ‘The *Hardiman* Principle: Revisited’ (2012) 19 *Australian Journal of Administrative Law* 152, 166.

<sup>840</sup> Ibid.

decision makers, who have mandates beyond appearing impartial, relating to the implementation of their statutory framework.<sup>841</sup>

11.66 Simon Daley and Nick Gouliaditis have questioned whether the *Hardiman* principle is appropriate.<sup>842</sup> For example, it is incongruous that in judicial review applications, where questions of public law are raised, that the only parties who are allowed to take an active role in the proceedings are those more concerned with narrow commercial or personal interests, not the broader public interest. Forming part of the basis of the *Hardiman* principle is the assumption that tribunals should not assume an active role in proceedings where there is a ‘contradictor of substance’.<sup>843</sup> An option to consider is whether the Attorney-General could be notified of proceedings brought under the *ADJR Act* and s 39B of the *Judiciary Act*, in a similar manner to notifications provided under s 78B of the *Judiciary Act*, and act as a ‘contradictor’.

11.67 It would be difficult to identify a particular criterion for the need to give notice, as a ‘public interest’ test is much broader than the constitutional issues test in s 78B, which involves ‘a matter arising under the Constitution or involving its interpretation’. However, if notice was provided for all applications, the Attorney-General (and the Council) could better monitor the use of different judicial review mechanisms, and it would be easier for the Attorney-General to intervene where appropriate in judicial review matters. The need to report to the Attorney-General on significant issues that arise in litigation under clause 3 of the *Legal Service Directions 2005* (Cth)<sup>844</sup> may already serve this purpose.

11.68 On the other hand, intervention by the Attorney-General may be unlikely, given the Attorney-General’s status as a member of Cabinet and the political nature of the role, as well as the fact that such litigation would need to be funded from the Attorney-General’s portfolio. Such a requirement may also be considered unduly burdensome, and there is a question of to whom the obligation would apply.

11.69 The *Hardiman* principle is increasingly complicated by its broad application and the development of ad hoc exceptions to the rule. While the Council acknowledges these as issues, they are questions worthy of broader consideration—they are beyond the scope of an examination of the federal system of judicial review.

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<sup>841</sup> Nicholas Gouliaditis, ‘The *Hardiman* Principle: Revisited’ (2012) 19 *Australian Journal of Administrative Law* 152, 166.

<sup>842</sup> Simon Daley and Nick Gouliaditis, ‘The *Hardiman* Principle’ (2010) 59 *Admin Review* 83, 86.

<sup>843</sup> Mathew Groves, ‘The *Hardiman* Rule’ (2012) 33(2) *Adelaide Law Review* (forthcoming).

<sup>844</sup> The *Legal Service Directions 2005* are issued under the *Judiciary Act 1903* (Cth) s 55ZF and can be downloaded from ComLaw <[www.comlaw.gov.au/Details/F2011C00098](http://www.comlaw.gov.au/Details/F2011C00098)>.

# APPENDIX A: JURISDICTIONAL LIMITS MODEL—DIRECTIONS TO DECISION MAKERS

*This Appendix sets out the views of Mr Roger Wilkins AO in favour of repealing the ADJR Act and replacing it with a list of jurisdictional limits on decision makers. Mr Wilkins, an appointed member of the Council, considers this model of review, briefly discussed in Chapter 4, to be preferable to the Council’s recommended model.*

A.1 The option of repealing the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) and relying solely on constitutional judicial review, with Parliament setting general jurisdictional limits on decision makers, has been suggested as a possibility by the Commonwealth Solicitor-General, Stephen Gageler SC.<sup>845</sup> Gageler has raised the idea of Parliament ‘spelling out’ the jurisdictional limits of administrative decision makers, ‘perhaps in some code or charter of administrative rights and responsibilities or at least in some new part of the *Acts Interpretation Act 1901* (Cth)’.<sup>846</sup>

A.2 This approach would fundamentally change the nature of judicial review in Australia. Rather than a list of grounds focusing on the review powers of the courts, as in the *ADJR Act*, a list of jurisdictional limits would focus on decision makers and the extent of their powers. Parliament could state, in general terms, the limits of the power of executive officers to make decisions under legislation, emphasising the standards that contribute to good decision making. Particular pieces of legislation could retain more specific limits as appropriate. This approach could also create a unified general system of federal judicial review, as opposed to the bifurcated system which currently exists.

## Bifurcation—the basic problem

A.3 The *ADJR Act* has played an important role in the administrative review system. It simplifies and clarifies judicial review procedures, provides for the right to request reasons, and allows for more flexible and understandable remedies. However, the increasing significance of constitutional judicial review contributes to the declining significance of the *ADJR Act*. The constitutional writs are now the subject of a large amount of case law, and their availability is much clearer.

A.4 In this Report, the existence of dual streams of general judicial review in the Federal Court—under the *ADJR Act* and under s 39B of the *Judiciary Act 1903* (Cth) (*Judiciary Act*)—has been identified by the Council as an issue with the current system of judicial review. Constitutional judicial review cannot be excluded, and to achieve a fully unified general system of review, I consider it necessary to repeal the *ADJR Act*. Currently, the scope of

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<sup>845</sup> Stephen Gageler, ‘Impact of migration law on the development of Australian administrative law’ (2010) 17 *Australian Journal of Administrative Law* 92, 105.

<sup>846</sup> Ibid.

constitutional judicial review encompasses and exceeds the scope of judicial review under the *ADJR Act*. The main exceptions to this rule are review of decisions for non-jurisdictional errors of law and review of decisions made under an enactment by persons who are not officers of the Commonwealth. However, the common-law development of these concepts continues to limit the scope and relevance of these exemptions.<sup>847</sup>

A.5 A unified system of judicial review would improve access to justice by eliminating technicalities and confusion created by dual, slightly divergent, systems of judicial review. Given the need for the Federal Court to have a judicial review jurisdiction which mirrors s 75(v) of the *Australian Constitution*, the only means of achieving this is to repeal the *ADJR Act*.

A.6 A further advantage of the reform would be that there would no longer be any need for a separate system for judicial review of migration decisions. Particular procedural differences, such as appeals to a single Federal Court judge, could remain in the *Migration Act 1958* (Cth), but the scope and grounds of review would be the same for general judicial review and review of migration decisions. Since migration decisions make up the bulk of applications for judicial review, this would allow for the coherent development of case law in relation to all Australian Government decision making.

## **Assisting decision makers**

A.7 The *ADJR Act* plays a significant role in refining the possible grounds of review and communicating them via statute. This list is considered to provide guidance to applicants on the kinds of errors that may ground an application for an order of review under the *ADJR Act*, and to some extent provide guidance to decision makers on what errors might make their decisions subject to judicial review orders. However, the grounds are directed to review by the court rather than to decision makers, and do not necessarily apply in relation to all administrative decision making. I consider the guidance role of the grounds to be limited.

A.8 The concept of ‘jurisdictional error’ defines the grounds available in the constitutional judicial review jurisdiction. It is not always clear, however, which errors by the decision maker amount to a jurisdictional error. Setting out the jurisdictional limits on decision makers would clarify which errors could ground an application for the constitutional writs.

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<sup>847</sup> See, for example, discussion of review of decisions of private bodies in Chapter 4.

## *Appendix A: Jurisdictional Limits Model*

A.9 Gageler has described the task of constitutional judicial review as ‘the policing of jurisdictional error’,<sup>848</sup> saying that it ‘amounts to nothing more or less than keeping administrative decision makers within the express or implied limits of the jurisdiction conferred on them by statute’.<sup>849</sup> However, Gageler notes that:

keeping administrative decision-makers within the express limits of the lawful authority given to them by statute is as uncontroversial as it is mechanical. Keeping administrative decision makers within the limits that are implied into the terms by which lawful authority is given to them by statute is more problematic.<sup>850</sup>

A.10 A list of jurisdictional limits could be designed to make explicit the limits on decision-making power which are currently implied by the courts into particular statutory schemes. These general limits would interact with particular limits in legislation. Compared to the current list of grounds in the *ADJR Act*, a list of jurisdictional limits would differ in two significant ways:

- they could be directed to decision makers rather than the courts; and
- they could be clearly stated rather than implied from the statute.

### *Instructions to decision makers*

A.11 Following this model, decision makers could refer to general jurisdictional limits and the statutes that enable their decisions to determine the correct processes. Rather than statutory interpretation and a general list of grounds in the *ADJR Act*, decision makers would have a clear statutory scheme to refer to. This could emphasise the role of judicial review in improving and enforcing decision-making standards.

A.12 I consider that it is appropriate that decision-making standards are set by Parliament, implemented by the executive and enforced by the courts. For example, under the *ADJR Act*, an application can be made for an order of review if a decision maker exercises ‘a personal discretionary power at the direction or behest of another person’. Under a jurisdictional limits model, a provision would state that a decision maker must not exercise a personal discretionary power at the direction or behest of another person.

A.13 Jurisdictional limits would also clarify the application of procedural fairness standards. Rather than stating that an application can be made for an order of review on the occurrence of a breach, a jurisdictional limits model would provide that a decision maker must comply with the rules of procedural fairness by providing persons affected with a fair hearing, and make the decision without bias or the appearance of bias.

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<sup>848</sup> Stephen Gageler, ‘Impact of migration law on the development of Australian administrative law’ (2010) 17 *Australian Journal of Administrative Law* 92, 104.

<sup>849</sup> *Ibid.*

<sup>850</sup> *Ibid.*

*Clear limits*

A.14 If an applicant can show that one of the grounds listed in ss 5 and 6 of the *ADJR Act* have been breached in a particular case then the court may make an order of review under s 16. However, the applicant must also show that a particular requirement, such as procedural fairness, applies in that case. Mason J in *Kioa v West* stated that:

The statutory grounds of review enumerated in s 5(1) are not new—they are a reflection in summary form of the grounds on which administrative decisions are susceptible to challenge at common law. The section is therefore to be read in the light of the common law and it should not be understood as working a challenge to common law grounds of review ... Viewed in this light, paragraph (a) does not impose an obligation to apply the rules of natural justice where, apart from s 5, there is no obligation on a person making a decision to comply with those rules or any of them. When the paragraph prescribes a breach of the rules as a ground of review it makes no assumption that the rules apply to every decision to which the sub-section relates. Under the general law it is always a question whether the rules apply and, if so, what rule or rules apply to the making of the particular decision.<sup>851</sup>

A.15 The precise boundaries of the decision maker's power are therefore still largely a matter of the interpretation of the statute conferring the power and the express or implied limits in the statute. As such, they do not provide a definitive statement of what is required when making decisions to which the *ADJR Act* applies, or a definitive statement of what errors will ground an order of review under s 16 of the Act.

A.16 An example of what this conclusion means in practice is *Botany Bay City Council v Minister for Transport and Regional Development (Botany Bay)*.<sup>852</sup> *Botany Bay* concerned a decision by the Commonwealth Minister for Transport and Regional Development to exempt from the requirements of administrative procedures established under s 6 of the *Environment Protection (Impact of Proposals) Act 1974* (Cth) certain directions by the relevant NSW minister relating to the use of runways at Sydney Airport. A Sydney resident living near the airport made an application for an order of review under s 5 of the *ADJR Act*. One of the grounds pleaded was paragraph 5(a) of the *ADJR Act*—that the Minister had breached the requirements of natural justice by not providing for a hearing on the exemption decision. Lehane J said:

if [the decision] affects the interests of the public, or a section of the public, at large rather than the interests of particular individuals it will, usually at least, be a decision in relation to which no particular individual or body can claim an entitlement to procedural fairness; particularly, an entitlement to be heard, in relation to a proposed decision, before it is made.

A.17 It is clear that listing breaches of natural justice as grounds for judicial review does not impose a requirement to afford natural justice in making all decisions to which the *ADJR Act* applies. A general list of jurisdictional limits would make clear the limits that did apply, and statutes could specifically exclude particular limits. Applicants would have greater

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<sup>851</sup> *Kioa v West* 159 CLR 550, 576–77.

<sup>852</sup> 137 ALR 281.



## Appendix A: Jurisdictional Limits Model

certainty about the power of decision makers, referring to clearly listed limitations in a statute rather than arguing that particular limits are implied.

### Reasons

A.18 If the *ADJR Act* were repealed, the location and extent of the requirement to give reasons would need to be considered. The simplest method would be retaining the current right to request reasons for statutory decisions and updating the current exemptions along the lines recommended in Chapter 9 of in this Report. The right to request reasons is a fundamental element of the administrative law system independent of the *ADJR Act*.

### Remedies

A.19 One of the advantages of the *ADJR Act* is the clear list of remedies in s 16 of the Act. The remedies in the *ADJR Act* are based on the prerogative writs and do not differ in substance from the remedies which the court may issue in the constitutional judicial review jurisdiction once an applicant has established their entitlement. The *ADJR Act* remedies are, however, stated in plain language and are easier for applicants to understand. A jurisdictional limits model could incorporate these plain language remedies through a provision stating that if a court has jurisdiction under s 39B(1), then the court could make:

- a quashing order;
- an order directing either of the parties to do something or refrain from doing something;
- an order declaring the rights of the parties; or
- an order referring the matter for further consideration, subject to directions as the court thinks fit.

### Implementation of the model

A.20 There are a number of ways the proposed model could be implemented. The *Acts Interpretation Act 1901* (Cth) could appropriately house the jurisdictional limits which are to be implied into all statutes, as suggested by Gageler.<sup>853</sup> It would clearly connect the jurisdictional limits with exercises of statutory power.

A.21 To define the Federal Courts' review power, s 39B(1) could be moved from the *Judiciary Act* into a general Judicial Review Act, which could include s 39B(1), a list of plain language remedies and a provision setting out the scope of the right to request reasons. Alternatively, s 39B(1) could remain in the *Judiciary Act* and the right to request reasons could be included in another Act, such as the *Freedom of Information Act 1982* (Cth).

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<sup>853</sup> Stephen Gageler, 'Impact of migration law on the development of Australian administrative law' (2010) 17 *Australian Journal of Administrative Law* 92, 105.

## **Conclusion**

A.22 The jurisdictional limits model would require a fundamental shift in thinking about judicial review from government officials, legal practitioners and academics. The model has at its core the constitutional writs, but moves beyond the remedial focus of the writs to give clear directions to decision makers about the exercise of statutory power. Issues relating to the judicial review of non-statutory power would remain for the courts to resolve, possibly influenced by Parliament's express limits on statutory power.

## APPENDIX B: SCHEDULE 1 EXEMPTIONS

B.1 There are currently a large number of exemptions in Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*). The Council considers many of these exemptions are justified by reference to the principles discussed in Chapter 5. A number of exemptions should clearly be removed.<sup>854</sup>

### Obsolete and unnecessary exemptions

B.2 The following exemptions are obsolete or unnecessary and should be removed:

- the *Coal Industry Act 1946* (Cth) is no longer in force and the exemption in paragraph (c) of Schedule 1 should be removed;
- the *Telephonic Communications (Interception) Act 1960* (Cth) is no longer in force and the exemption in paragraph (d) of Schedule 1 should be removed; and
- the National Workplace Relations Consultative Council does not make any decisions under statute and the exemption in paragraph (l) of Schedule 1 should be removed.

#### Recommendation B1

Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be amended to remove the following exemptions:

- the exemption of decisions under the *Coal Industry Act 1946* (Cth) in paragraph (c);
- the exemption of decisions under the *Telephonic Communications (Interception) Act 1960* (Cth) in paragraph (d); and
- the exemption of decisions of the National Workplace Relations Consultative Council in paragraph (l).

### Workplace relations decisions

B.3 There are a number of exempt Acts and decisions in Schedule 1 relating to workplace relations. The Council separately contacted the Department of Education, Employment and Workplace Relations, Fair Work Australia (FWA) and the Australian Building and Construction Commission (ABCC) to seek their comments on these exemptions. The Fair Work Ombudsman (FWO) made a submission to the Council during the consultation period.

<sup>854</sup> The exemptions of decisions under the *Migration Act 1958* in paragraphs (da) and (db) and the exemptions of decisions relating to taxation in paragraphs (ga), (gaa) and (gb) of Schedule 1 of the *ADJR Act* are not discussed in this Appendix. The separate statutory review schemes for migration and taxation decisions are discussed in Chapter 6.

## *Federal Judicial Review in Australia*

B.4 A version of this exemption has been in the *ADJR Act* since it came into force. At the time of the Council's 1989 report, the exemption related to decisions of the Industrial Relations Court. Overall in 1989 the Council considered that because, at the time, decisions of the Industrial Relations Commission were not subject to review under s 39B of the *Judiciary Act 1903* (Cth) (*Judiciary Act*), it was also appropriate for them to be excluded from the *ADJR Act*.

B.5 This consideration no longer applies. The Federal Court was given the IRC jurisdiction in 1996 and the exemption in s 39B was removed. It was not reinstated by the *Fair Work Act 2009* (Cth) (*Fair Work Act*). As a result, all FWA, FWO and ABCC decisions are excluded from the *ADJR Act* but not from s 39B review. The Council's previous views therefore need to be re-evaluated on a principled basis.

### *Decisions by Fair Work Australia (paragraph (a))*

B.6 In Report No 32 the Council stated that:

The Commission is not an ordinary adjudicative tribunal. Effectively, it is a legislative tribunal, the major decisions of which have an important impact on the Australian economy. The parties to Commission proceedings are private individuals: employers on the one hand, employees on the other.<sup>855</sup>

B.7 These considerations still apply to FWA. FWA undertakes a variety of functions including:

- setting the terms for 'Modern Awards';
- making orders with respect to enterprise bargaining disputes;
- setting the minimum wage; and
- dealing with unfair dismissal matters.

B.8 There is a legislative framework setting out criteria and relevant considerations for most of the decisions by FWA. Award decisions determine future rights and conduct between employers and employees and are of general application. They are therefore not purely administrative in character. Bargaining decisions focus on parties reaching agreements and are analogous to private arbitration between parties.

B.9 Section 563 of the *Fair Work Act* gives the Federal Court jurisdiction in any matter where a writ of mandamus or prohibition or an injunction is sought in the Federal Court against a person holding office under the Act. However, there have also been several applications for writs under s 39B of the *Judiciary Act* with respect to FWA decisions, some of which have been successful.<sup>856</sup> The Federal Court has also held that s 562 of the *Fair*

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<sup>855</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 58.

<sup>856</sup> *Australian Postal Corporation v Gorman* (2011) 196 FCR 126; *Construction, Forestry, Mining & Energy Union v Deputy President Hamberger* (2011) 195 FCR 74; *Coal & Allied Mining Services Pty Ltd v Lawler* (2011) 192 FCR 78.

## Appendix B: Schedule 1 Exemptions

*Work Act* gives the Federal Court jurisdiction to grant mandamus.<sup>857</sup> Other cases have involved the Federal Court's jurisdiction under s 39B(1A)(c).<sup>858</sup>

B.10 Similar considerations apply to decisions under the *Fair Work (Registered Organisations) Act 2009* (Cth), which gives FWA the jurisdiction to grant the constitutional writs in s 339A, as well as the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), and the *Workplace Relations Act 1996* (Cth).

B.11 The Council's view is that the exemption for decisions of FWA is justified, due to the special nature of industrial relations decisions. These decisions affect the national economy (for example, minimum wage decisions) and determine general rights and obligations into the future (in the case of Award decisions). The Council also notes the arbitration functions of FWA in some matters. The Council considers that the *Fair Work Act* provides a comprehensive system of review for FWA decisions.

### Recommendation B2

The exemption of Fair Work Australia decisions in paragraph (a) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### *Fair Work Ombudsman decisions (paragraph (a))*

B.12 The FWO has a variety of powers and functions including the power to investigate premises, issue compliance notices and apply to the Federal Court for civil penalty orders. These powers are similar to the powers of many regulatory bodies, which are not generally exempt from the *ADJR Act*. Unlike FWA, the FWO does not function like a tribunal. Rather, its functions and powers are more those of an administrative decision maker.

B.13 The FWO made a submission to the inquiry, and did not raise an objection to the general exemption in Schedule 1 being removed. The FWO was more concerned about the possible removal of the exemption from the right to request reasons in Schedule 2(f) if the Schedule 1 exemption was repealed.<sup>859</sup>

B.14 The Council does not propose that the exemption in Schedule 2(f) be removed. The main argument for retaining the exemption for the FWO is that judicial review proceedings have the potential to fragment enforcement proceedings. No other enforcement agencies have a general exemption on this basis. Applications could currently be made under s 39B of the *Judiciary Act*.

B.15 Overall, therefore, there is little justification for retaining the exemption for the FWO in Schedule 1. The primary argument in support would simply be that the FWO is established by the *Fair Work Act*, and it makes sense to treat the FWO and FWA consistently.

<sup>857</sup> *Construction, Forestry, Mining & Energy Union v Deputy President Hamberger* (2011) 195 FCR 74.

<sup>858</sup> *Alcoa of Australia Limited (ACN 004 879 298) v The Australian Workers' Union (No 2)* [2010] FCA 610.

<sup>859</sup> Fair Work Ombudsman, Submission No 22 (1 July 2011) 1.

B.16 However, the Council considers that the justifications relating to the special role of FWA do not apply to the FWO, and the exemption should be altered to distinguish decisions by the two bodies, making the FWO subject to the *ADJR Act*.

**Recommendation B3**

The exemption of Fair Work Ombudsman decisions in paragraph (a) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

*Decisions under the Building and Construction Industry Improvement Act 2005 (Cth)*  
*(paragraph (a))*

B.17 In his report on the *Building and Construction Industry Improvement Act 2005* (Cth) (*Building and Construction Industry Improvement Act*), Justice Wilcox considered that ABCC decisions should for the most part be subject to review under the *ADJR Act*.<sup>860</sup>

B.18 The *Building and Construction Industry Improvement Act* does not contain an appeals process within the legislation for application for judicial review writs. The only judicial review available is under s 39B of the *Judiciary Act*. In addition, the *Building and Construction Industry Improvement Act* contains occupational health and safety provisions which give the Federal Safety Commission accreditation powers. These are regulatory-type powers which would ordinarily be subject to *ADJR Act* review.

B.19 The ABCC submitted to the Council that the Commissioner agreed with the FWO's submission—that the *ADJR Act* exemption for the *Building and Construction Industry Improvement Act* be removed, but the Schedule 2(f) exemptions be retained.<sup>861</sup>

B.20 The Council considers that the exemption for the ABCC should be removed. However, with the passing of the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth), the ABCC's functions will now be undertaken by a Fair Work Building Industry Inspectorate. The Act also establishes the Fair Work Building Industry Inspectorate Advisory Board. The Advisory Board's role is to make recommendations to the Director on the policies and priorities of the Building Inspectorate. The *Building and Construction Industry Improvement Act* is renamed the *Fair Work (Building Industry) Act 2012* (Cth).

B.21 The Council considers, however, that as with the FWO, the functions carried out by the new Fair Work Building Industry Inspectorate are regulatory in nature, and not subject to the same considerations as FWA's adjudicative and conciliation functions.

<sup>860</sup> Wilcox J, *Transition to Fair Work Australia for the Building and Construction Industry* (Commonwealth Government, 2009) 66 and 89.

<sup>861</sup> Office of the Australian Building and Construction Commissioner, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (4 November 2011).



**Recommendation B4**

The exemption of Australian Building and Construction Commission decisions in paragraph (a) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

**National security decisions**

*Intelligence Services Act 2001* (Cth) (paragraph (d))

B.22 The *Intelligence Services Act 2001* (Cth) (*Intelligence Services Act*) sets out the functions of: the Australian Secret Intelligence Service, the Defence Imagery and Geospatial Organisation, and the Defence Signals Directorate. These organisations obtain intelligence and conduct counter intelligence activities primarily in relation to persons or organisations outside Australia.

B.23 These organisations are subject to a number of accountability mechanisms, including:

- review by the Inspector General of Intelligence Security (IGIS);
- oversight by the Parliamentary Joint Committee on Intelligence and Security (PJCIS); and
- oversight by the Australian National Audit Office.

B.24 The Attorney-General's Department (AGD) submitted that the availability of judicial review could inhibit the proper functions of *Intelligence Services Act* agencies, both due to the risk of public exposure of intelligence information that is, by its very nature, secret, and due to the probable increase in the number of applications for review of decisions. The AGD noted the existence of accountability mechanisms in the Act, including the requirement for ministerial authorisation of any activities additional to the express statutory functions of the agencies. The AGD also pointed out that these agencies focus on persons and organisations outside Australia, and Ministerial authorisation is required where agencies perform incidental functions in respect of Australian persons or organisations.<sup>862</sup>

B.25 The Council considers that the external focus of the *Intelligence Services Act* makes this an appropriate exemption.

**Recommendation B5**

The exemption of decisions under the *Intelligence Services Act 2001* (Cth) in paragraph (d) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

<sup>862</sup> National Security Law and Policy Division, Attorney-General's Department, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (8 November 2011).

*Australian Security Intelligence Organisation Act 1979 (Cth) (paragraph (d))*

B.26 The AGD pointed to the following accountability mechanisms which apply to ASIO in addition to review under s 39B of the *Judiciary Act*: review by the IGIS, and oversight by the PJCIS.<sup>863</sup> There are also Ministerial accountability mechanisms, including Ministerial approval of warrant powers under Division 2 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*) require and requirements that the Director-General report to the Minister on the extent to which each warrant issued has assisted the organisation in carrying out its statutory functions. Only s 39B review provides for review of the legality of decisions by a court, however.

B.27 The AGD argues more specifically that powers which are part of a process of intelligence gathering provided for in the *ASIO Act*—such as the power to issue search warrants and the authorisation of the use of listening devices—raise issues parallel to those in relation to criminal investigations. The AGD submitted that ‘even the knowledge of such warrants being issued will often be inimical to the purpose to be achieved—as with criminal investigations—and hence call into question the suitability of the application of the *ADJR Act*’.<sup>864</sup>

B.28 The considerations discussed above regarding the need to protect sensitive security information justify the exemption of (at least some) decisions under the *ASIO Act*. With regard to the analogy drawn by the AGD between intelligence gathering and criminal investigations, the Council notes that criminal investigations prior to prosecution are subject to the *ADJR Act* but exempt from the obligation to provide reasons<sup>865</sup> and thus applicants would not have knowledge of warrants at the intelligence gathering stage.

**Recommendation B6**

The exemption from the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of all decisions under the *Australian Security Intelligence Organisation Act 1979* (Cth) in paragraph (d) of Schedule 1 of the *ADJR Act* should be reviewed.

*Inspector-General of Intelligence and Security Act 1986 (Cth) (paragraph (d))*

B.29 The IGIS is an accountability body for security and intelligence organisations. The IGIS can receive complaints and can be directed by the government to conduct inquiries, and investigate the actions of intelligence agencies. The IGIS produces reports and can make recommendations to government. Judicial review of the IGIS’ decisions is likely to be of limited utility, given the non-binding nature of most IGIS decisions.<sup>866</sup> The AGD submitted that concerns relating to the production of classified information in judicial review

<sup>863</sup> National Security Law and Policy Division, Attorney-General’s Department, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (8 November 2011).

<sup>864</sup> Ibid.

<sup>865</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) sch 2 paragraph (e).

<sup>866</sup> While IGIS decisions on how to conduct an inquiry (for example, decisions to exercise its statutory information-gathering powers) are binding and supported by coercive powers, the findings and recommendations of an IGIS inquiry are merely advisory.

## Appendix B: Schedule 1 Exemptions

proceedings also apply to IGIS decisions.<sup>867</sup> However, since the IGIS is an accountability body rather than an intelligence gathering body, the Council does not consider that the exemption from the *ADJR Act* should be retained.

### Recommendation B7

The exemption of decisions under the *Inspector-General of Intelligence and Security Act 1986* (Cth) in paragraph (d) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

### *Telecommunications (Interception and Access) Act 1979 (Cth) (paragraph (d))*

B.30 The *Telecommunications (Interception and Access) Act 1979* (Cth) (*Telecommunications (Interception and Access) Act*) provides a regime for access to covert interception powers to assist with the investigation of certain offences, accessed by both Commonwealth and State and Territory interception agencies. Government agencies in different jurisdictions oversee the operation of the regime and compliance with the *Telecommunications (Interception and Access) Act*. Queensland and Victoria have introduced Public Interest Monitors—independent bodies which represent the public interest in relation to applications for covert warrants.

B.31 However, none of these mechanisms ensures legal accountability for decisions made under the Act, and are not consistent throughout jurisdictions. Agencies monitoring the regime do not provide independent accountability to the same level as judicial review.

B.32 Under the Act, Administrative Appeals Tribunal (AAT) members nominated by the Attorney-General can, in a personal capacity, issue warrants. The AGD submitted that warrants are appropriately reviewed during criminal justice proceedings, and that *ADJR Act* review would risk fragmenting those proceedings.<sup>868</sup>

B.33 Generally, the AGD was concerned that capabilities and methodologies for covert techniques are protected, noting the potential for the release of small amounts of information through the judicial review process to build a picture which allowed offenders to modify their mode of operation.<sup>869</sup>

B.34 Decisions to issue warrants under the *Telecommunications (Interception and Access) Act* are sometimes reviewable under section 39B of the *Judiciary Act*. However, because AAT members issuing warrants do so in a personal capacity, the court has no jurisdiction to grant a writ of mandamus or prohibition against a member who issued a warrant.<sup>870</sup> Nevertheless, in *Carmody v MacKellar*,<sup>871</sup> Merkel J held that the Court could grant remedies in relation to the continued operation of the warrant, for example preventing AFP officers from relying upon

<sup>867</sup> National Security Law and Policy Division, Attorney-General's Department, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (8 November 2011).

<sup>868</sup> Ibid.

<sup>869</sup> Ibid.

<sup>870</sup> *Grollo v Palmer* (1995) 184 CLR 348.

<sup>871</sup> (1996) 68 FCR 265.

the warrants.<sup>872</sup> Because no information is given to a person about the issue of a warrant a challenge to the validity of the warrant will almost always occur.

B.35 The Council considers that the concerns about warrants are not a major issue. If a person is not aware of the issue of a warrant, they cannot apply for review of the decision. There is no requirement to provide reasons or notice of such decisions because of the operation of paragraph (e) of Schedule 2 of the *ADJR Act*. This means such decisions are extremely unlikely to be challenged. Section 9A of the *ADJR Act* prevents these decisions from being subject to review once a prosecution is commenced.

B.36 The Council therefore considers that there is no particular need for the specific inclusion of the *Telecommunications (Interception and Access) Act* in Schedule 1, as the decisions of concern are either already excluded from Schedule 1 or Schedule 2 under more general headings.

#### **Recommendation B8**

The exemption of decisions under the *Telecommunications (Interception and Access) Act 1979* (Cth) in paragraph (d) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be reviewed in light of other exemptions in Schedules 1 and 2.

#### *Decisions under the Telecommunications Act 1997 (Cth) (paragraph (daa))*

B.37 Decisions made by the Attorney-General under s 58A of the *Telecommunications Act 1997* (Cth) to withdraw a telecommunications carrier licence on security grounds are exempt from review under the *ADJR Act*. Directions made on security grounds under s 581(3) to a carriage provider to stop supplying services to a particular person are also exempt from review.

B.38 Similar considerations apply to these decisions as to those discussed above about the dissemination of security information.

#### **Recommendation B9**

The exemption of decisions of the Attorney-General under s 58A or s 581(3) of the *Telecommunications Act 1997* (Cth) in paragraph (daa) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

#### *Certain Criminal Code decisions (paragraphs (dab) and (dac))*

B.39 The AGD submitted to the Council that decisions of the Attorney-General under s 104.2 (to consent to the making of a request for an interim control order) and Division 105 (relating to preventative detention orders) of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) are appropriately excluded from *ADJR Act* review because of their security nature.<sup>873</sup>

<sup>872</sup> *Carmody v MacKellar* (1996) 68 FCR 265.

<sup>873</sup> Attorney-General's Department (Cth), Submission No 21 (9 August 2011) 6.

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B.40 The justification for the exemption of decisions of the Attorney-General under s 104.2 seems to be related to these decisions being part of a ‘process’. S 104.2 requires a senior member of the AFP to obtain the Attorney-General’s written consent prior to applying to a court for an interim control order. If the Attorney-General consents, the AFP may apply to a court for the order. The order, which may be made by a court under s 104.4, is an interim order rather than a final order, issued for security reasons. These interim orders are issued to prevent security threats materialising before criminal charges can be brought<sup>874</sup> or a final order can be made by the court. Section 104.4 requires the court to be satisfied on the balance of probabilities:

- that making the order would substantially assist in preventing a terrorist act; or
- that the person has provided training to, or received training from, a listed terrorist organisation; and
- that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

B.41 The interim control order must set a date (as soon as possible, but at least 72 hours after the interim control order is made) for the person to attend court for the court to confirm, vary or revoke the interim order, or declare the order void. Given that this process involves a court making a substantive decision on the application made by the AFP officer with the consent of the Attorney-General, allowing for *ADJR Act* review of the Attorney-General’s decision is unnecessary, as it would interfere with another court process. The AGD also noted that there are appropriate judicial appeal mechanisms for the person subject to an order to challenge it once it is issued by the court.<sup>875</sup>

### Recommendation B10

The exemption of decisions of the Attorney-General under section 104.2 of the *Criminal Code* in paragraph (dab) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

B.42 Division 105 relates to preventative detention orders. An initial preventative detention order can be issued under s 105.8 by a senior AFP officer for up to 24 hours, if there are reasonable grounds to suspect the person:

- will engage in a terrorist act;
- possesses a thing which is connected with the preparation for a terrorist Act; or

<sup>874</sup> Criminal charges may not be brought against the person, as control orders are not necessarily related to later prosecutions. Rather, they are protective in nature.

<sup>875</sup> National Security Law and Policy Division, Attorney-General’s Department, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (8 November 2011).

- has done a thing in preparation for a terrorist Act.<sup>876</sup>

B.43 The AFP officer must be satisfied that making the order would substantially assist in preventing a terrorist act occurring and that detaining the person for the relevant period under the order is reasonably necessary this purpose.<sup>877</sup>

B.44 The ‘terrorist act’ must be imminent and likely to occur in the next 14 days.<sup>878</sup> Section 105.4 also allows an order to be issued if the AFP officer is satisfied that a terrorist act has occurred within the last 28 days and it is reasonably necessary to detain the person to preserve the evidence.

B.45 The Commonwealth Ombudsman must be notified when an order has been made and when a person has been taken into custody under an order. The order can be extended, but only up to 24 hours after the person was taken into custody under the initial order. An application can also be made for a continued preventative detention order to certain issuing authorities.<sup>879</sup> Continued preventative detention orders cannot be issued for longer than 48 hours after the person was initially detained under the initial preventative detention order. If the person is not taken into custody within 48 hours after an initial preventative detention order is made, the order ceases to have effect.

B.46 The AGD notes that alternative mechanisms of review are available, including merits review of the decision to issue a control order by the Security Appeals Division of the AAT.<sup>880</sup> Remedies available under this review include a determination that the Commonwealth should compensate the person who was detained if the Tribunal declares the decision to be void. However, an application may not be made to a court or to the AAT while the control order is in force.

B.47 Unlike s 104.2, there is no court involvement in this process. It is related to an investigative process, but not one where criminal justice proceedings are already on foot. Section 39B review would be available. As such there seems to be limited utility in excluding *ADJR Act* review. However, given the short timeframes, judicial review proceedings may not be particularly useful in relation to these decisions. As a general principle, administrative decisions made in relation to criminal investigation processes where proceedings have not yet commenced are not excluded from review. The Council suggests that this exemption is achieving little, and could be removed, but notes that an application could be made in relation to a detention decision under s 39B of the *Judiciary Act* or using the merits review process in s 105.51 of the *Criminal Code*.

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<sup>876</sup> *Criminal Code* s 105.4(4).

<sup>877</sup> *Ibid* s 105.4(4).

<sup>878</sup> *Ibid* s 104.4(5).

<sup>879</sup> Certain judges, Federal Magistrates, AAT members and retired judges are issuing authorities for continued preventative detention orders.

<sup>880</sup> National Security Law and Policy Division, Attorney-General’s Department, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (8 November 2011); see also *Criminal Code* s 105.51.



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### Recommendation B11

The exemption of decisions under Division 105 of the *Criminal Code* in paragraph (dac) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

#### *Decisions regarding transfer of prisoners (paragraphs (xb) and (xc))*

B.48 These exemptions appear to be based on the other ‘security’ exemptions. As noted above, ‘security’ related decisions are not intrinsically unsuitable for review, but certain considerations with regard to the protection of information about national security agency operations may justify exemptions from *ADJR Act* review. The problem with this exemption is that only one of the grounds needs to relate to national security for the exemption to apply to the entire decision.

B.49 The Council’s view is that this exemption is not justified, and that provisions designed to protect any security information would be more appropriate for these decisions, rather than a Schedule 1 exemption.

### Recommendation B12

The exemption of decisions regarding transfer of prisoners in paragraphs (xb) and (xc) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

#### *Security Appeals Division of the Administrative Appeals Tribunal (paragraph (y))*

B.50 There is a mechanism for review of security assessment decisions through a merits review process in the Security Appeals Division of the AAT. The AGD submits that this merits review process has been specifically designed to balance security interests and individual rights. The AGD supports maintaining this exemption, for reasons discussed above relating to the security of information.<sup>881</sup>

B.51 Review of the AAT’s decision in the Federal Court is available via appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (*AAT Act*). As discussed in Chapter 6, s 44 is an accessible and appropriate means of seeking review of AAT decisions.

B.52 The Council therefore considers that, given the concern about protection of national security information (which is subject to particular controls in the Security Appeals Division), and the fact that review is available via s 44 and s 39B, this exemption should be maintained.

### Recommendation B13

The exemption of decisions of the Security Appeals Division of the Administrative Appeals Tribunal in paragraph (y) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

<sup>881</sup>

Attorney-General’s Department (Cth), Submission No 21 (9 August 2011) 6.



## Financial regulation decisions

### *Decisions under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (paragraph (b))*

B.53 Under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (*Foreign Acquisitions and Takeovers Act*) foreign individuals and businesses can propose to invest in Australia. The Treasurer is empowered to:

- issue a statement of no objections;
- issue a statement of no objections subject to conditions;
- extend the initial 30 day time period for considering a proposal by a further 90 days; or
- prohibit the proposal.

The *Foreign Acquisitions and Takeovers Act* allows conditions to be imposed only where, but for the conditions, the proposal would be contrary to the national interest. Similarly, proposals are only prohibited where they are contrary to the national interest (and, by implication, these concerns cannot be resolved through conditions).

B.54 Judicial review applications can be made in relation foreign to investment decisions under s 39B of the *Judiciary Act*. There are two main groups that would have standing to apply for review:

- a party to the transaction, seeking review of a decision to prohibit an investment or apply conditions; and
- individuals or organisations not party to the transaction, whose interests are directly affected by a decision not to object to or prohibit a proposal.

B.55 The extent to which the courts are able to review determinations by the Treasurer under s 39B of the *Judiciary Act* was considered in *Cannvest Global Communications Corporation v the Treasurer of the Commonwealth of Australia*.<sup>882</sup> Hill J stated that:

A court would be loath to interfere with a discretion vested in the Treasurer on a matter such as national interest. ... Parliament has entrusted decisions on matters of national interest to the Treasurer; not to the courts. ... If it can be shown that the Treasurer has not fulfilled a condition precedent to making an order under s 18 (for example, because the Treasurer erred in law in coming to the conclusion that a person was a foreign corporation) the Court can intervene to set aside the decision. So too, if the Treasurer in forming a view about the national interest takes into account a matter which is clearly irrelevant to the national interest, the Court can intervene. So too, if the Treasurer has made a decision which no reasonable person acting in accordance with his authority could have made, the Court can intervene. But the area in which judicial challenge can succeed is

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<sup>882</sup> (1997) 147 ALR 509.

## Appendix B: Schedule 1 Exemptions

clearly circumscribed by the breadth of the consideration of national interest entrusted to the Treasurer.<sup>883</sup>

B.56 In its Report No 1, *Administrative Decisions (Judicial Review) Regulations*, the Council mentioned that the reason put forward by the Department of the Treasury for exemption of these decisions was that classified or commercially confidential material may have to be revealed in proceedings or statements of reasons.

B.57 In Report No 32 the Council did not agree, and was of the view that the exemption should be removed, for a number of reasons. First, the Council was of the view that other legal principles would operate to protect sensitive information in an *ADJR Act* matter as well as in a s 39B matter. The Council considered that the question of exemption from the requirement to provide a statement of reasons on request was a separate matter. Secondly, the Council considered that the fact that the national interest was one of the criteria to be taken into account did not justify the exclusion of judicial review. Thirdly, the Council considered that the enforceability of the Treasurer's orders in State and Territory Supreme Courts indicated that they should be subject to review.

B.58 A minority of the Council disagreed with this position and considered that the national interest considerations justified continued exemption from the operation of the *ADJR Act*. This dissenting view is possibly less compelling now, as there are many decisions in legislation, most subject to *ADJR Act* review, which require a Minister to consider the 'national interest'. Examples include the decision not to grant or to cancel an international broadcasting licence under the *Broadcasting Services Act 1992* (Cth), the making of exemption orders under the *Competition and Consumer Act 2010* (Cth), a number of decisions in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). The Council has not considered this to be a general principle justifying exemption.

B.59 In relation to this inquiry, the Council notes several concerns about removing the exemption, including:

- the potential for an increase in applications under the *ADJR Act* due to the more liberal standing rules, increasing the costs of administering the Act;
- an indirect cost in the form of applicants being more reluctant to share information with the Foreign Investment Review Board (FIRB), due to an actual or perceived likelihood of information being disclosed in *ADJR Act* proceedings which may have the ancillary impact of impairing the quality of advice provided by the FIRB Secretariat on foreign investment proposals; and
- broader economic impacts from increased complexity of processing applications.

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*Canwest Global Communications Corporation v the Treasurer of the Commonwealth of Australia* (1997) 147 ALR 509, 525.

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B.60 While the Council acknowledges the disadvantage of a potential increase in the cost of administering the Act, it does not regard it as a principled reason for exemption. The most compelling reason for an exemption, in the Council's view, is the potential broad impacts on the national economy if applicants become less willing to share information due to a perceived likelihood of information being disclosed in *ADJR Act* proceedings. The Council does not consider that more information would *actually* be disclosed in *ADJR Act* proceedings.

B.61 The Council considers that the exemption should, on balance, be retained. Review under s 39B of the *Judiciary Act* is fairly limited, and applying a new review scheme could potentially have serious consequences for the national economy.

### **Recommendation B14**

The exemption of decisions under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) in paragraph (h) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### *Decisions of the Minister under Division 1 of Part 7.4 of the Corporations Act 2001 (Cth) (paragraph (ha))*

B.62 This provision relates to limits on share ownership in certain types of companies. The Minister makes decisions under the provision taking into account the 'national interest'. Presumably this is the reason why the exemption was originally inserted. However, many decisions with a similar criterion are reviewable under the *ADJR Act*, and the decision does not seem to be one of particular national significance (for example, there seems to be less of an argument here than for the foreign takeovers legislation, which involves relations with other countries).

B.63 The Council has been made aware that, as a number of other review mechanisms already exist—by way of an application under s 1337B of the *Corporations Act 2001* (Cth) (*Corporations Act*) and under s 39B of the *Judiciary Act*—the exemption is of little utility. Moreover, even an exemption from the obligation to give reasons would be of little utility given the availability of discovery in litigation.

### **Recommendation B15**

The exemption of decisions of the Minister under Division 1 of Part 7.4 of the *Corporations Act 2001* (Cth) in paragraph (ha) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

### *Decisions of the SEGC under Part 7.5 of the Corporations Act (paragraph (hb))*

B.64 The Security Exchanges Guarantee Corporation (SEGC) is a company limited by guarantee which was incorporated in 1987 to be the trustee of the National Guarantee Fund (NGF). The sole member of SEGC is ASX Limited. Part 7.5 confers on the SEGC powers

## *Appendix B: Schedule 1 Exemptions*

to make various other decisions relating to the management of the NGF including decisions about borrowing money, giving security, determining the size of the fund, the imposition of levies on market operators and participants and making operating rules about the Fund.

B.65 A claimant who is dissatisfied with a decision of the SEGC may bring proceedings under s 888H of the *Corporations Act* to establish their claim. The courts' powers in these cases are broader than on a judicial review application, and allow the court to consider the merits of the decision.

B.66 It has been suggested that the commercial nature of many of these decisions is a possible justification for maintaining the existing exemption of *ADJR Act* review. The Council was made aware that there are a number of other safeguards available, such as ministerial disallowance of decisions.

B.67 The Council's view is that ministerial disallowance and scrutiny is not an appropriate substitute for judicial review. The commercial nature of the decisions is not a principle which the Council considers justifies the exemption of *ADJR Act* review, where the decisions are made under an enactment and would otherwise be subject to review. The SEGC is still fulfilling a regulatory function rather than operating in a competitive commercial environment. Review would be available under s 39B of the *Judiciary Act*, and does not appear to be utilised by applicants, probably due to the availability of proceedings under s 888H, which allow an assessment of the merits of the case.

B.68 As such, the best justification for maintaining the exemption is that a review mechanism currently exists which is as efficient and effective as *ADJR Act* review. The Council considers that the s 888H provides such a scheme, and the exemption should be retained.

### **Recommendation B16**

The exemption of decisions of the Security Exchanges Guarantee Corporation under Part 7.5 of the *Corporations Act 2001* (Cth) in paragraph (hb) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### *Decisions by APRA relating to certain insolvency matters (paragraphs (hc) and (hd))*

B.69 This provision relates to payments made by the Australian Prudential Regulation Authority (APRA) to account holders with protected accounts with an Authorised Deposit-taking Institution, or to policyholders with a General Insurer, which APRA has sought to be wound up for insolvency. The decisions which are exempt from the *ADJR Act* are:

- the dollar amounts of individual entitlements of depositors under the Financial Claims Scheme (FCS); and
- decisions as to whether a person has a valid claim against an insurer under the FCS as it relates to insurance.

B.70 The Explanatory Memorandum justified the exemption as ensuring:

that the scheme can be administered in a seamless and timely way. If depositors were able to challenge the decision of APRA about individual entitlements and amounts received, there is the potential to delay finalisation of payments to all depositors which could significantly complicate the management of the failure.

Similarly, the FCS is designed to ensure that eligible insurance claims are paid in a normal timeframe, rather than in the liquidation stage which is considerably more drawn out. As such, any mechanism which reviews APRA's decision to pay claims in a normal timeframe would seem to undermine the point of the FCS.<sup>884</sup>

B.71 Policyholders can still pursue outstanding amounts that they believe they are owed through the liquidation process.

B.72 APRA has informed the Council that *ADJR Act* review, because it is more accessible (than the alternative route under s39B of the Judiciary Act), would increase the likelihood of challenges to APRA's decisions and compromise APRA's ability to fulfil its responsibilities.<sup>885</sup>

B.73 The Council agrees with the reasoning in the explanatory memorandum, and with APRA's position.

#### **Recommendation B17**

The exemptions of decisions by the Australian Prudential Regulation Authority relating to certain insolvency matters in paragraphs (hc) and (hd) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

*Decisions giving effect to the foreign investment policy of the Commonwealth Government under the Banking (Foreign Exchange) Regulations 1959 (Cth) (paragraph (j))*

B.74 The Council stated in 1989 that it was appropriate that decisions made with regard to high level policy should still be able to be tested for legality, and that this exemption was therefore not justified.<sup>886</sup> The Council considered that the broad scope of the decision was likely to limit review.<sup>887</sup>

B.75 The main issue with this exemption is that the decisions or classes of decisions which are exempt from the *ADJR Act* are extremely unclear. The *Banking (Foreign Exchange) Regulations 1959* (Cth) governs the ability of the Reserve Bank to regulate foreign currency exchanges, transfer of money outside Australia, proceeds of exports and a number of other matters relating to foreign exchanges.

<sup>884</sup> Explanatory Memorandum, Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Bill 2008 (Cth) 54 [3.39]–[3.40].

<sup>885</sup> The Treasury, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (19 December 2011).

<sup>886</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 69.

<sup>887</sup> *Ibid.*

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B.76 There does not seem to be much justification for this exemption on the face of the provision given that:

- these decisions would be subject to review under s 39B of the *Judiciary Act*;
- the lack of transparency about which decisions are excluded from ADJR Act review; and
- the fact that the legality of a decision, not the policy behind it, is subject to review.

### Recommendation B18

The exemption of decisions giving effect to the foreign investment policy of the Commonwealth Government under the *Banking (Foreign Exchange) Regulations 1959* (Cth) in paragraph (j) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

### Customs decisions

*Decision to require and take securities in respect of duty that may be payable under the Customs Tariff (Anti-Dumping) Act 1975 (Cth) (paragraph (p))*

B.77 Paragraph (p) was inserted in Schedule 1 by the *Customs Securities (Anti-Dumping) Amendment Act 1982* (Cth), which also introduced s 42(1B) of the *Customs Act 1901* (Cth) (*Customs Act*) which provided an express power to take such securities. These amendments followed litigation under the *ADJR Act* which challenged decisions to impose securities.<sup>888</sup>

B.78 Section 42 allows securities to be taken from importers in relation to certain goods. Applications for the imposition of trade measures are made to the CEO, and investigated by the CEO, leading up to a report to the Minister, within 155 days of initiation.<sup>889</sup> The Minister can only impose measures if satisfied that there has been dumping (sale of goods for export to Australia at less than the price in the country of export) or a subsidy is provided by the exporting country, and that has caused material injury to an Australian industry producing like goods.<sup>890</sup>

B.79 Not later than 60 days after the initiation of such an investigation, the CEO may make a Preliminary Affirmative Determination under s 269TD, that there appear to be sufficient grounds for the publication of a dumping duty or countervailing duty notice, which must be publicly notified. It is once that Determination has been made that most securities are taken under s 42 for duty which may become payable under the *Customs Tariff (Anti-Dumping) Act 1975* (Cth).

B.80 The securities that are taken at that stage are usually only in the form of an undertaking, and at the level calculated at the time of the s 269TD decision as the likely

<sup>888</sup> See *Tasman Timber Ltd v Minister for Industry and Commerce* (1982) 46 ALR 149; *Feltex Reidrubber Ltd v Minister for Industry and Commerce* (1982) 46 ALR 171.

<sup>889</sup> *Customs Securities (Anti-Dumping) Amendment Act 1982* (Cth) ss 269TB–TEB.

<sup>890</sup> *Ibid* ss 269TG–TJA.



amount of the anti-dumping or countervailing duty that will be imposed. If the Minister ultimately decides to impose duty upon receipt of the report of the CEO on the investigation, the duty cannot be imposed retrospectively unless there has been a s 269TD preliminary affirmative decision and securities have been taken, and the amount of retrospective duty then collected must not exceed the amount of the securities taken.<sup>891</sup> If the Minister decides not to impose measures, then the securities are cancelled, and no retrospective duty is imposed. The securities expire within six months.<sup>892</sup>

B.81 Australian Customs and Border Protection Service (ACBPS) submitted that these provisions and practice are designed to be consistent with the relevant World Trade Organisation International Agreements. The taking of securities is part of the system of imposing provisional measures to protect Australian industry pending completion of an investigation that is recognised both under the *Customs Act* and the relevant International Agreements. Those international agreements require member nations to provide for judicial or administrative review of final determination decisions, but do not require any review to be provided of the imposition of provisional measures. Consistent with those requirements, the final decisions by the Minister are subject to administrative review, as provided in Division 9 of Part XVB of the *Customs Act*. Final decisions of the Minister are also subject to judicial review, both under s39B of the *Judiciary Act* and under the *ADJR Act*.<sup>893</sup>

B.82 The Council commented in Report No 32 that the exemption had not achieved a great deal, as a number of applications for review had been made under s 39B.<sup>894</sup>

B.83 In response to the Council's inquiries in relation to this inquiry, however, the ACBPS submitted that the exemption should be retained. The ACBPS noted that the taking of these securities:

- are taken as a preliminary and precautionary decision, subject to a final determination at a later stage;
- are usually taken only in the form of an undertaking;
- are taken as part of a system for imposing provisional measures of trade measures for the interim protection of Australian industry that is recognised in International Law, and
- the final decision is usually made within a few months of the initial taking of securities, and the securities expire anyway within 6 months.<sup>895</sup>

B.84 The ACBPS noted that while the taking of these securities is not exempt from s 39B of the *Judiciary Act*, it perhaps it should be. The ACBPS submitted that these decisions may

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<sup>891</sup> *Customs Act 1901* (Cth) s 269TN; *Customs Tariff (Anti-Dumping) Act 1975* (Cth) s 12.

<sup>892</sup> *Customs Tariff (Anti-Dumping) Act 1975* (Cth) s 42(3).

<sup>893</sup> Australian Customs and Border Protection Service, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (28 October 2011).

<sup>894</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 73.

<sup>895</sup> Australian Customs and Border Protection Service, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (28 October 2011).



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not be final and operative consistent with the High Court's decision in the *Australian Broadcasting Tribunal v Bond*,<sup>896</sup> and that the exemption therefore would preclude applications, and possibly signal public policy reasons in s 39B cases why the taking of securities may not be appropriate for judicial review.<sup>897</sup>

B.85 The Council is of the view that the arguments for retaining the exemption do not correspond with any of the principles for excluding *ADJR Act* review. The ACBPS makes the point that the decisions may not be final and operative, and therefore not within the *ADJR Act* jurisdiction.<sup>898</sup> It is appropriate that this question is answered by the Court. There is no legal basis for arguing that an *ADJR Act* exemption signals that a matter is not appropriate for constitutional review, and this has not been the case with migration decisions or any other decisions listed in Schedule 1. Section 39B review remains appropriate, as these decisions are not ones which should be litigated in the High Court in the first instance.

### Recommendation B19

The exemption of decisions to require and take securities in respect of duty that may be payable under the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) in paragraph (p) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

*Decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under the Customs Act 1901 (Cth) and Customs Tariff Act 1995 (Cth) (paragraph (e))*

B.86 These exemptions are included in the list of taxation-type decisions in paragraph (e). The system for applying for review of the imposition of customs duties is similar to the system in the *Taxation Administration Act 1953* (Cth) (*Taxation Administration Act*). The ACBPS submitted to the Council that 'the AAT is the major jurisdiction for independent review of decisions regarding ordinary customs duty (ie that imposed by the *Customs Tariff Act 1995*)'.<sup>899</sup>

B.87 Section 273GA(1)(haaa) of the *Customs Act* states that a decision to refuse a refund of duty under s 163 of the *Customs Act* is directly reviewable by the AAT. The ACBPS noted that:

a decision demanding the payment of customs duty can also be challenged by:

- paying the duty demanded under protest under s 167 of [the] *Customs Act*;
- and then, within six months, either

<sup>896</sup> (1990) 170 CLR 321.

<sup>897</sup> Australian Customs and Border Protection Service, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (28 October 2011).

<sup>898</sup> Ibid.

<sup>899</sup> Ibid.

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- instituting a Court action to recover the money as provided in s 167(4); or
- applying to the AAT for review as provided in s 273GA(2), for review of the demand, or any decision forming part of the process of making, or leading up to the making of, that demand.<sup>900</sup>

B.88 The ACBPS also stated that they were not aware of any s 167(4) Court actions since the AAT alternative was introduced. The ACBPS argued that ‘this indicates that importers are generally much happier to dispute duty via the AAT, which enables full merits review, rather than via the Courts’.<sup>901</sup>

B.89 Finally, the ACBPS noted that:

where a demand for duty is made as a result of audit activity, on goods that have already entered home consumption, the importer may simply refuse to pay the duty, and can dispute liability for the duty in a debt recovery action: *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290. Customs would then have to establish that the duty was due, to the satisfaction of the Court. That would usually enable the Court to in effect review both the legality and the merits of each aspect of Customs decision to demand duty. This has occurred in some cases.<sup>902</sup>

B.90 In this case, the Council agrees that there is an existing, comprehensive system of judicial review, analogous to the system of review of taxation decisions in Part IVC of the *Taxation Administration Act*, which provides for both merits review and review by the courts.

### **Recommendation B20**

The exemption of decisions relating to assessments or calculations of tax, charge or duty under the *Customs Act 1901* (Cth) and *Customs Tariff Act 1995* (Cth) in paragraph (e) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

## **Miscellaneous decisions**

### *Decisions under the Defence Force Discipline Act 1982 (Cth) (paragraph (o))*

B.91 The *Defence Force Discipline Act 1982* (Cth) provides for its own code of appeals and review relating to discipline in the Defence Force. The Department of Defence in its submission to the current inquiry supported maintaining this exemption:

The armed forces are disciplined forces which are hierarchically organised. Military discipline is, and always has been, an essential aspect of command of the Defence Force. The offences contained in the Defence Force Discipline Act

<sup>900</sup> Australian Customs and Border Protection Service, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (28 October 2011).

<sup>901</sup> Ibid.

<sup>902</sup> Ibid.

## Appendix B: Schedule 1 Exemptions

exist only to facilitate discipline within the Defence Force and do not have broader application outside of the military environment.<sup>903</sup>

B.92 Defence made a similar argument in 1989. The Council, however, did not consider this to be sufficient reason to justify an exemption, on the basis that s 10 of the *ADJR Act* provided room for the court to refuse to grant an application for review on the basis that a more adequate remedy is available.<sup>904</sup>

B.93 However, there does seem to be more merit to Defence's argument than the Council gave credit to in 1989. Different considerations apply to decisions made by the military about individuals within the organisation than in relation to most administrative decisions. The nature of the military, the currently voluntary nature of military service and the importance of hierarchy are all factors which distinguish military discipline decisions from other administrative decisions. Constitutional judicial review remains available, clearly, but it is possible that in the case of the military, constitutional review is sufficient. The Council is also mindful that further reforms to military justice have been announced by the Government as a consequence of the decision of the High Court that declared the Australian Military Court to be unconstitutional.<sup>905</sup>

### Recommendation B21

The exemption of decisions under the *Defence Force Discipline Act 1982* (Cth) in paragraph (o) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### *Decisions under subsection 25(1) or Part IIIA of the Commonwealth Electoral Act 1918 (Cth) (paragraph q)*

B.94 Section 25(1) of the *Commonwealth Electoral Act 1918* (Cth) (*Commonwealth Electoral Act*) involves the Governor-General's power to terminate the appointment of an 'electoral officer by reason of misbehaviour or physical or mental incapacity'. The Australian Electoral Commission (AEC) submitted that this power is not an AEC power but one exercisable by the Governor-General and therefore does not impact on the AEC's administration.

B.95 Part IIIA of the *Commonwealth Electoral Act* no longer exists. Before 1983, this part dealt with redistributions. Those provisions are now contained in Part IV of the *Commonwealth Electoral Act*. Part IV now also contains s 77 which states that 'notwithstanding anything contained in any other law', decisions of the AEC and the Augmented Electoral Commission are final on redistribution matters. Part IIIA in paragraph (q) of Schedule 1 of the *ADJR Act* is therefore not required in order to exclude these decisions from review under the Act.

B.96 Part IV relates to electoral re-distributions. Section 48(1) requires the Electoral Commissioner, after he has ascertained the numbers of the people in the Commonwealth and

<sup>903</sup> Department of Defence, Department of Defence, Submission No 4 (24 June 2011) 4–5.

<sup>904</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 73.

<sup>905</sup> *Lane v Morrison* (2010) 239 CLR 230.

the several States to determine the number of members of the House of Representatives to be chosen in the several States at a general election. Section 48(3) provides that a decision by the Electoral Commissioner is final and conclusive, subject to the *Australian Constitution* and to s 39B of the *Judiciary Act*.

B.97 Section 77 of Part IV of the Electoral Act likewise provides that decisions made under the Part by the Electoral Commissioner, the Electoral Commission, a redistribution committee, an augmented Electoral Commission, or the redistribution commissioners for a State are final and conclusive. They remain, however, subject to review under the *Constitution* and to s 39B of the *Judiciary Act*.

B.98 In 1989, the Council took the view that the availability of review under s 39B meant that decisions under Part IV should not be excluded from the operation of the Act.<sup>906</sup> The Electoral Commissioner, on the other hand, ‘argued strongly for the maintenance of the present exclusion’, submitting that ‘opportunities to disrupt the redrawing of boundaries open to persons with a vexatious or partisan purpose ought to be minimised to the greatest extent possible.’<sup>907</sup> The Commissioner also raised concerns about the risk of delay in completing a redistribution which the possibility of review under the *ADJR Act* would bring.<sup>908</sup>

B.99 This Council considers that decisions relating to election boundaries are of a special nature, and that it is appropriate to continue deal with these matters in the constitutional review jurisdiction. The AEC notes that other accountability mechanisms in Part IV of the Act apply to re-distribution decisions, including the requirement to publish statements of reasons, issue draft re-distribution proposals and to hold public hearings.<sup>909</sup>

B.100 More broadly, the Council notes that most decisions under the Electoral Act can be reviewed under the *ADJR Act*, depending on the timing of applications for review, and the nature of relief sought. The notable exception is challenges to the results of an election, where the Court of Disputed Returns has exclusive review jurisdiction,<sup>910</sup> and only where a petition is lodged within 40 days after the declaration of the poll. This exception recognises the public benefit in the quick resolution of elections.

## **Recommendation B22**

The exemption of decisions under subsection 25(1) or Part IIIA of the *Commonwealth Electoral Act 1918* (Cth) in paragraph (q) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

<sup>906</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 74–75.

<sup>907</sup> Ibid 74.

<sup>908</sup> Ibid.

<sup>909</sup> Australian Electoral Commission, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (31 May 2011).

<sup>910</sup> See s 353 of the *Commonwealth Electoral Act 1918*.

## Appendix B: Schedule 1 Exemptions

### *Decisions under section 176 or 248 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (paragraph qa)*

B.101 Section 176 is a decision to apply for a civil penalty order taken by the CEO of the Australian Transaction Reports and Analysis Centre (AUSTRAC). As discussed above, applications for civil penalty orders are appropriately not subject to judicial review under the ADJR Act. If covered by a more general exemption as recommended, this exemption could be removed.

#### **Recommendation B23**

The exemption of decisions under section 176 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) in paragraph (qa) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) should be removed if a new general exemption for application for civil penalty orders is included in the *ADJR Act*.

B.102 Section 248 gives the AUSTRAC CEO the power to declare that the Act does not apply to a particular person. The AGD and AUSTRAC submitted that these decisions were appropriately subject to review on the basis that:

- they are similar to a legislative decision under s 247 of the Act (s 247 provides that the Anti-Money Laundering/Counter-Terrorism Financing Rules (AML/CTF Rules) may provide that a specified provision of this Act does not apply to a designated service that is of a kind specified in the AML/CTF Rules);
- decisions require consideration of the broader impact on the financial sector, not merely the individual concerned;
- ADJR Act review would risk exposing information about people who supplied information to AUSTRAC; and
- the availability of review could increase costs for AUSTRAC.

B.103 While the decision may be similar to the decision under s 247, the decision under s 248 is appropriately subject to judicial review because it is not legislative in nature—ie it applies to a particular person rather than to a class of individuals. It is also unlikely that *ADJR Act* review would significantly increase the number of applications, and therefore costs. Regardless, costs are not a justification for excluding *ADJR Act* review, as the same argument could be made with respect to any decision. The concern about exposing information could be appropriately dealt with by a Schedule 2 exemption. The remaining reason—the need to consider broader financial impacts not just the individual—is likely to affect the grounds of review available, and may make successful review applications less likely. Many decisions currently reviewable under the *ADJR Act* require assessments of this kind.

**Recommendation B24**

The exemption of decisions under section 248 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) in paragraph (qa) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

*Decisions under the Extradition Act 1988 (Cth) (paragraph (r))*

B.104 In 1989, the majority of the Council was of the view that this exemption should be removed, given the availability of review under s 39B.<sup>911</sup> However, a minority of the Council expressed the view that the statutory review mechanisms in the *Extradition Act 1988* (Cth) (*Extradition Act*) should remain the primary means of seeking review of such decisions, in line with the expectations of foreign governments.<sup>912</sup>

B.105 The AGD in its submission to the current inquiry supported retaining this exemption because it facilitates the expeditious resolution of extradition cases, and because judicial review is already available under s 39B of the *Judiciary Act* and through the appeals mechanisms in the *Extradition Act*.<sup>913</sup>

B.106 In relation to extradition two principles therefore justify the retention of the exemption:

- the fact that there are no issues with access to suitable review in relation to extradition decisions (given that review is almost always sought at various stages of the process and applicants are clearly able to exercise their review rights under both the *Extradition Act* and s 39B), and that there is an appeals process in the Act, indicates that this exemption is not limiting the accessibility or effectiveness of review; and
- as observed in the Council's Report No 47, *The Scope of Judicial Review*, the availability of ADJR Act review could interfere with other legal processes.

**Recommendation B25**

The exemption of decisions under the *Extradition Act 1988* (Cth) in paragraph (r) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

<sup>911</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 75–77.

<sup>912</sup> Ibid 82.

<sup>913</sup> The Australian Government has proposed a number of amendments to the *Extradition Act 1988*, but not to the current system of judicial review. See the exposure draft legislation and explanatory materials at <[www.ag.gov.au/Extraditionandmutualassistance/Extraditionandmutualassistancereforms/](http://www.ag.gov.au/Extraditionandmutualassistance/Extraditionandmutualassistancereforms/)>.



## Appendix B: Schedule 1 Exemptions

### *Determinations made by the Child Support Registrar under Part 6A of the Child Support (Assessment) Act 1989 (Cth) (paragraph (s))*

B.107 Part 6A of the *Child Support (Assessment) Act 1989* (Cth) relates to decisions by the Child Support Registrar to determine that the Act can be departed from in relation to an administrative assessment of child support. Individuals can apply for such a determination to be made, or the Registrar can make the determination on his or her own initiative. Under s 80 of the *Child Support (Registration and Collection) Act 1988* (Cth) (*Child Support (Registration and Collection) Act*), either the carer entitled to child support or the liable parent may lodge an objection to the decision. The *Child Support (Registration and Collection) Act* sets out a number of detailed notice requirements which the Registrar must comply with.

B.108 The Registrar's decision in relation to the objection, including decisions as to extensions of time, are subject to review by the Social Security Appeals Tribunal (SSAT), and following that are subject to appeals on a question of law from the SSAT. The *Child Support (Registration and Collection) Act* also sets out detailed provision for proceedings in the SSAT.

B.109 These decisions are subject to a well-established existing review scheme, which provides for both merits review and review by the court on a question of law.

#### **Recommendation B26**

The exemption of determinations made by the Child Support Registrar under Part 6A of the *Child Support (Assessment) Act 1989* (Cth) in paragraph (s) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### *Decisions by private companies (paragraphs (t), (u), (v), (va), (za) and (zb))*

B.110 The decisions of the following private companies and their subsidiaries are excluded from the *ADJR Act*:

- Qantas Airways Limited;
- Snowy Mountains Engineering Corporation Limited;
- CSL Limited;
- Telstra Corporation Limited; and
- Snowy Hydro Limited.

B.111 Decisions made under Part VIIIB of the *Judiciary Act*, which relates to the establishment of the Australian Government Solicitor, are also excluded.

B.112 These provisions are all directed to ensuring that decisions of privatised companies are not subject to judicial review of decisions, given that they are established or privatised by statute. Given that none of those acts contain actual decision-making powers, these exemptions are probably unnecessary to achieve this purpose. It is unlikely that any decisions taken by the companies would be made 'under' the relevant enactment. The Department of

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Finance and Deregulation submitted that decisions of Snowy Hydro should be exempted because of the commercial nature of its operations.<sup>914</sup>

B.113 The Council considers that these exemptions are unnecessary, given that these bodies, while established by statute, do not make decisions ‘under’ enactments.

### **Recommendation B27**

The exemptions of decisions by private companies and of decisions made under Part VIIIB of the *Judiciary Act 1903* (Cth) in paragraphs (t), (u), (v), (va), (za) and (zb) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

### *Witness protection program (paragraphs (w) and (x))*

B.114 The *Witness Protection Act 1994* (Cth) (*Witness Protection Act*) provides for the protection of participants in the National Witness Protection Program (NWPP).

B.115 The AGD submitted that disclosure that a person is a participant in the NWPP can compromise the safety of the participant or that of their family and that disclosure of the workings of the NWPP can compromise the safety of police officers assigned to the program.<sup>915</sup> Disclosure of NWPP information is an offence under the *Witness Protection Act*. The NWPP is also subject to various complaints mechanisms, including oversight by the Commonwealth Ombudsman and internal complaints processes. Some decisions in the Act are also subject to internal review.

B.116 The Council considers that given the importance of protecting the safety of participants in the NWPP, and the fact that the decisions made under the Act largely relate to consensual agreements between a witness and the Commissioner and as such are not ordinary administrative decisions, it is not appropriate to have these decisions subject to *ADJR Act* review.

### **Recommendation B28**

The exemption of decisions relating to the National Witness Protection Program in paragraphs (w) and (x) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### *Decisions under section 34B or 34D of the Australian Crime Commission Act 2002 (Cth) (paragraph (wa))*

B.117 Section 34B of the *Australian Crime Commission Act 2002* (Cth) relates to applications by an examiner for contempt order from a court. Section 34D gives the examiner the power to order the detention of person in respect of whom the contempt order request has been made.

<sup>914</sup> Department of Finance and Deregulation, Submission No 19 (18 July 2011) 6.

<sup>915</sup> Attorney-General's Department, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (31 October 2011).

## Appendix B: Schedule 1 Exemptions

B.118 These exemptions appear to be in place because the power of the examiner in respect of these decisions is more ‘court-like’ in nature. The ACC did not comment on these current exemptions in its submissions. A decision to detain is a serious decision. However, a decision to apply for a contempt order is appropriately reviewed as part of the Court’s consideration of the application. Since the detention is linked to the request, it seems logical to also exempt the detention decision. Both decisions would only have effect until the court made a final decision as to the contempt order, making judicial review of the decision an unnecessary delay.

### Recommendation B29

The exemption of decisions under section 34B or 34D of the *Australian Crime Commission Act 2002* (Cth) in paragraph (wa) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

*Decisions to prosecute persons for any offence against a law of the Commonwealth, a State or a Territory (paragraph (xa))*

B.119 This general exemption is justified by the potential disruptive effect on criminal proceedings. However, the exemption was not recommended by the Council in its 1989 report. The Council’s view was that the court had sufficient discretion to avoid interference with the criminal prosecution process, and only exceptional circumstances would justify interference.<sup>916</sup> The Council was of the view that the Commonwealth Director of Public Prosecutions (CDPP) should be accountable for the legality of prosecution decisions, and as such should be subject to *ADJR Act* review.

B.120 This provision was inserted in 2000 by the *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) (*Jurisdiction of Courts Act*). The Minister in his second reading speech stated that the purpose of the amendment was ‘to avoid the use of unmeritorious delaying tactics in the criminal justice process’.<sup>917</sup> The Senate Scrutiny of Bills Committee expressed concerns that the provision would also prevent meritorious applications for review, in its *Alert Digest No 3 of 2000*.

B.121 In response to the Committee, the Attorney-General gave the following reasons for the provision:

- The cross-vesting of jurisdiction in Federal, State and Territory courts meant that federal criminal prosecutions could occur in State and Territory courts, and that those courts had exclusive jurisdiction to hear the matter where the prosecution was commenced in those courts
- By making an *ADJR Act* application in the Federal Court (noting that *ADJR Act* applications *must* be made in the Federal Court), a person could

<sup>916</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, Report No 32 (1989) 86–67.

<sup>917</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 8 March 2000, 14,111 (Daryl Williams MP, Attorney-General).

remove the action from the State or Territory court, thus losing priority for the criminal matter. This increases the duration and costs of the criminal prosecution, as well as the consequence of loss of recall on the part of witnesses, and the possible unavailability of documentary evidence for investigators.

- The *Jurisdiction of Courts Act* also conferred s 39B writ jurisdiction on State and Territory Courts, in matters where the State or Territory court had exclusive jurisdiction (see s 39B(1B) of the *Judiciary Act*).<sup>918</sup>

B.122 As a result, a decision to prosecute could be challenged in a State or Territory court as part of the criminal proceedings, and the State or Territory court could issue constitutional writs in such a case.

B.123 The situation now is quite different to that in 1989. There are good reasons relating to court jurisdiction and the desirability of not allowing delays in criminal proceedings for exempting these decisions from the *ADJR Act*, noting that judicial review writs are otherwise available through the operation of the *Judiciary Act*.

#### **Recommendation B30**

The exemption of decisions to prosecute persons for any offence against a law of the Commonwealth, a State or a Territory in paragraph (xa) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

#### *CDPP or examiner decisions in relation to proceeds of crime (paragraphs (ya), (yb) and (yc))*

B.124 This Part relates to examinations conducted by an approved examiner in relation to orders made by a court (eg restraining order, compensation order, confiscation order) on application by the CDPP.

B.125 *Proceeds of Crime Act 2002* (Cth) (*Proceeds of Crime Act*) proceedings are closely tied with criminal proceedings and are akin to proceedings for civil penalties (to the extent that they involve an application to the court for orders). Furthermore, as for criminal proceedings, questions relating to a decision to prosecute under the *Proceeds of Crime Act* can be addressed by the court in the course of those proceedings. This would avoid the fragmentation of proceedings that separate review by a different court, under the *ADJR Act*, would entail.

#### **Recommendation B31**

The exemption of decisions in relation to proceeds of crime in paragraphs (ya), (yb) and (yc) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

<sup>918</sup> See *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) s 56.

## *Appendix B: Schedule 1 Exemptions*

### *Decisions of justices of federal courts (paragraphs (zd), (ze) and (zf))*

B.126 Provisions relating to decisions regarding the management of court business are not reviewable under s 39B of the *Judiciary Act* either. The Council considers that the exemption is appropriate.

#### **Recommendation B32**

The exemptions of decisions of justices of federal courts in paragraphs (zd), (ze) and (zf) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

## APPENDIX C: SCHEDULE 2 EXEMPTIONS

C.1 Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) contains a large number of exemptions from the obligation to provide reasons in s 13. The Council considers many of these can be justified by reference to the principles discussed above. The Council also considers that certain exemptions can be removed from Schedule 2 in conjunction with the Council's recommended amendments to s 13A (**Recommendation 14**), or alternatively, be moved to Schedule 1, if they are justified by the principles discussed in Chapter 5 to have an exemption from the *ADJR Act* as a whole.

### Obsolete and unnecessary exemptions

#### *Obsolete Tribunals*

C.2 The Academic Salaries Tribunal and Federal Police Arbitral Tribunal do not exist and reference to these Tribunals in paragraph (j) of Schedule 2, exempting the decisions of those Tribunals from the requirement to provide a statement of reasons, should be removed.

C.3 The Council has recommended that the exemption in paragraph (j) be removed in its entirety (see **Recommendation C17**).

#### *National Director of the Commonwealth Employment Service*

C.4 The National Director of the Commonwealth Employment Service was established by the *Commonwealth Employment Service Act 1978* (Cth) (*Commonwealth Employment Service Act*), and continued to exist under the *Employment Services Act 1994* (Cth). The *Commonwealth Employment Service Act* was removed in 2006 and the National Director of Commonwealth Employment Service no longer exists. Further, the Department of Employment Education and Workplace Relations does not consider the exemption necessary.<sup>919</sup>

#### **Recommendation C1**

The exemption of decisions of the National Director of the Commonwealth Employment Service in paragraph (o) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

### Decisions relating to Defence Force personnel matters

C.5 Schedule 2 contains two exemptions in relation to defence force personnel matters. Paragraph (a) exempts decisions in connection with redress of grievances or wrongs with respect to members of the Defence Force. Paragraph (b) exempts decisions in connection with personnel management with respect to the Defence Force, including decisions relating to particular persons.

<sup>919</sup> Department of Education, Employment and Workplace Relations, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (15 November 2011) 2.



## Appendix C: Schedule 2 Exemptions

C.6 In Report No 33, the Council noted that excluding Defence force personnel matters was consistent with the High Court decision in *Coutts v Commonwealth*<sup>920</sup> where the Court held that the dismissal of an officer of the Defence Force was not open to judicial review on the grounds of breach of natural justice. On that basis, the Council recommended moving paragraphs (a) and (b) to Schedule 1.

C.7 The Council endorses its previous recommendation with respect to paragraphs (a) and (b) and considers that these exemptions in Schedule 1 can be justified on the basis that the decisions relate to the discipline of defence force members and there is already a well-established alternative scheme which is as accessible and effective as *ADJR Act* review.

### Recommendation C2

The exemptions of decisions relating to Defence Force personnel matters in paragraphs (a) and (b) should be moved from Schedule 2 to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

## Decisions relating to consular and diplomatic privileges and immunities

C.8 Paragraph (c) exempts decisions under the *Consular Privileges and Immunities Act 1972* (Cth), the *Diplomatic Privileges and Immunities Act 1967* (Cth) and the *International Organisations (Privileges and Immunities) Act 1963* (Cth) from the obligation to provide reasons. DFAT were consulted in relation to these exemptions. They agreed with the Council's recommendation in Report No 33 that the Acts listed above should be exempt from the *ADJR Act* as a whole.<sup>921</sup>

C.9 The Acts listed in paragraph (c) contain very few administrative discretionary decisions. An example of an administrative discretion in all three Acts is where the Minister may withdraw privileges and immunities of specified individuals under certain circumstances. The Council previously commented that any dispute arising out of this discretion could be resolved by traditional diplomatic methods. DFAT submitted to the Council in 1991<sup>922</sup> that the administrative law package was clearly not introduced into Parliament for the benefit of the diplomatic and consular community.

C.10 The Council considers that decisions made under the Acts listed in paragraph (c) should be exempt from the *ADJR Act* as a whole. It is the Council's view this can be justified on the principle that the decisions relate to representatives of the diplomatic or consular community.

<sup>920</sup> (1985) 157 CLR 91.

<sup>921</sup> Department of Foreign Affairs and Trade, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (19 December 2011).

<sup>922</sup> Administrative Review Council, *Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, 1991.

**Recommendation C3**

The exemption of decisions relating to consular and diplomatic privileges and immunities in paragraph (c) should be moved from Schedule 2 to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

**Decisions by the Export Finance and Insurance Corporation**

C.11 Paragraph (zb) exempts decisions made under Part 4 or 5 of the *Export Finance and Insurance Corporation Act 1991* (Cth) (*Export Finance Act*) from the obligation to provide reasons. The *Export Finance Act* provides for the Export Finance and Insurance Corporation (EFIC) to enter into transactions on both the Commercial Account (under Part 4 of the *Export Finance Act*) and the National Interest Account (under Part 5).

C.12 The EFIC were consulted in relation to the exemption in paragraph (zb). The EFIC submitted the exemption in paragraph (zb) should be maintained as the information that is considered when making a decision under part 4 or 5 of the *Export Finance Act* is complex, commercially sensitive, and occasionally provided in-confidence. Occasionally decisions made under Part 5 are based on Cabinet deliberations and are therefore highly sensitive. The secrecy provision in s 87 of the *Export Finance Act* and the standing exemption in s 7(2) and part 2 of Schedule 2 of the *Freedom of Information Act 1982* govern how the EFIC deals with confidential information provided to it.<sup>923</sup>

C.13 The EFIC submitted in order to produce a meaningful statement of reasons, it would invariably need to refer to confidential information which would be excluded by the terms of s 13A of the *ADJR Act*.<sup>924</sup>

C.14 The Council considers that decisions relating to the activities of the EFIC under Part 4 or 5 of the *Export Finance Act* should continue to be exempt from the obligation to provide reasons. This can be justified on the basis that the obligation to provide reasons would, or could reasonably be expected to, prejudice the ability of the Australian Government or another body exercising power under a Commonwealth enactment to manage the Australian economy.

**Recommendation C4**

The exemption of decisions relating to the activities of the Export Finance and Insurance Corporation in paragraph (zb) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

<sup>923</sup> Export Finance and Insurance Corporation, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (16 November 2011).

<sup>924</sup> Ibid.

## Migration decisions

C.15 Paragraph (d) exempts decisions under the *Migration Act 1958* (Cth) (*Migration Act*) from the obligation to provide reasons.

C.16 In Report No 33, the Council recommended that s 13 of the *ADJR Act* be amended to provide that, in spite of any other provision of the *ADJR Act*, reasons are not available for decisions made under s 34 of the *Migration Act* or a decision concerning the issue or cancellation of a visa. To make a request for reasons in these cases, persons aggrieved by the decision would have to show that they were, at the time of the decision:

- the holder of a valid visa; or
- an Australian citizen or an Australian permanent resident (as defined in the *Migration Regulations 1994* (Cth)).

C.17 It is possible that the framing of the amendment previously recommended by the Council in the terms of ‘unless the person is aggrieved’ is potentially so broad it would capture nearly all decisions made under the *Migration Act*. This could be problematic given the large volumes of administrative decisions made by the Department of Immigration and Citizenship under the *Migration Act*. In any event, it is unclear what additional benefit a statement of reasons would have given to persons aggrieved, in addition to the existing obligations under the *Migration Act* to provide notification of decisions.

C.18 In light of these reasons, the Council considers the current exemption can be justified on the basis that an alternative scheme for providing reasons for decisions exists which is as accessible and effective as the *ADJR Act* obligation. The mandatory notification requirements under *Migration Act* would likely be compliant with the statement of reasons requirements in the *ADJR Act*.

### Recommendation C5

The exemption of decisions under the *Migration Act 1958* (Cth) in paragraph (d) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

## Decisions relating to national security

C.19 The decisions described in paragraphs (da) and (db) relate to controlling what information can be disclosed in federal criminal or civil court proceedings. The object of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) is to prevent the disclosure of information in federal criminal and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.<sup>925</sup> The National Security Law and Policy Division of the Attorney-General’s Department (NSLPD) were consulted about these exemptions.

<sup>925</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 3.

C.20 NSLPD submitted that decisions made in the national security context would often have to balance the need to protect sensitive information with procedural fairness obligations. Therefore, NSLPD considered there should be scope to have classified and unclassified statements of reasons in relation to national security decisions, as well as the possibility that in some cases it may not be appropriate to provide even a summary of reasons without prejudicing national security. NSLPD submitted there is a possibility that providing reasons for decision might disclose sensitive operational information that could alert persons to a confidential source of information. NSLPD also noted the availability of other mechanisms to test the legality of these decisions, in particular the court process that follows after the Attorney-General has issued a certificate to prevent disclosure of information in court proceedings.<sup>926</sup>

C.21 The Council considers that exemptions in paragraphs (da) and (db) can be justified as providing reasons in this context has the potential to fragment or frustrate another legal process which is already underway.

#### **Recommendation C6**

The exemptions of decisions relating to national security in paragraphs (da) and (db) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### **Decisions relating to law enforcement integrity**

#### *Parliamentary Joint Committee on Law Enforcement*

C.22 Paragraph (dc) exempts decisions made under ss 8(4) and 9(4) of the *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) (*Parliamentary Joint Committee on Law Enforcement Act*) from the obligation to provide reasons.

C.23 Sections 8 and 9 of the *Parliamentary Joint Committee on Law Enforcement Act* create an obligation on the Chief Executive Officer of the Australian Crime Commission (ACC) and Commissioner of the Australian Federal Police (AFP) respectively, to comply with a request from the Parliamentary Joint Committee on Law Enforcement for information in relation to an ACC or AFP investigation. If the Chief Executive Officer or Commissioner do not comply with the request to disclose due to the sensitivity of the information, the Committee may then apply to the Minister to determine if the information is sensitive and if its disclosure is warranted in the public interest.

C.24 The AFP consider this exemption should be retained as it is directed at protecting sensitive information. The AFP submitted that the exemption in paragraph (dc) is consistent with the legislative scheme for the disclosure of sensitive information contained in s 9 of the *Parliamentary Joint Committee on Law Enforcement Act*. The AFP expressed concern about protecting confidential information, however they did not consider the operation of s 13A in

<sup>926</sup> Attorney-General's Department (Cth), Submission No 21 (9 August 2011) 10.

## Appendix C: Schedule 2 Exemptions

this regard. The AFP also did not consider using redacted reasons, which the Council has discussed on previous occasions.<sup>927</sup>

C.25 The Council considers that the exemption in paragraph (dc) is justified on the basis that providing reasons for a decision under ss 8(4) and 9(4) of the *Parliamentary Joint Committee on Law Enforcement Act* has the potential to fragment or frustrate another legal process which is already underway by revealing sensitive information of an investigation.

### Recommendation C7

The exemption of decisions under s 8(4) or 9(4) of the *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth) in paragraph (dc) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### *Law Enforcement Integrity Commissioner Act 2006 (Cth)*

C.26 Paragraph (eaa) exempts decisions under the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (*LEIC Act*) in connection with a corruption investigation or public inquiry from the obligation to provide reasons. The Australian Commission for Law Enforcement Integrity (ACLEI) were consulted about this exemption.

C.27 The decisions under the *LEIC Act* relate to procedural decisions, such as issuing a notice to produce documents, holding a hearing, or prohibiting disclosure of any information relating to a hearing. The *LEIC Act* also sets out the nature of the information to be included in the report of an investigation, including:

- the Commissioner's findings on the issue of corruption;
- the evidence and other material on which those findings are based;
- any action that the Commissioner has taken, or proposes to take under; Part 10 of the Act in relation to the investigation; and
- any recommendations that the Integrity Commissioner thinks fit to make and, if recommendations are made, the reasons for those recommendations.

C.28 ACLEI considered there is a continuing need for the exemptions. The *LEIC Act* contains a framework for providing detailed information and investigation reports to parties, and for balancing the rights of those concerned with relevant criminal justice and security concerns. ACLEI submitted that the legislative framework, read together with the exemption in paragraph (eaa) is more apposite to the policy aims of ensuring the integrity of the Commonwealth's law enforcement and anti-corruption framework than a 'one-size-fits-all' approach in the *ADJR Act*.<sup>928</sup>

<sup>927</sup> Australian Federal Police, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (21 November 2011) 5–6.

<sup>928</sup> Australian Law Enforcement Integrity Commission, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (15 November 2011) 2.

C.29 The Council considers the exemption in paragraph (eaa) can be justified as providing reasons for a decision has the potential to fragment or frustrate another legal process which is already underway.

**Recommendation C8**

The exemption of decisions under the *Law Enforcement Integrity Commissioner Act 2006* (Cth) in paragraph (eaa) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

*Australian Crime Commission Act 2002 (Cth)*

C.30 Paragraph (ea) exempts decisions under the *Australian Crime Commission Act 2002* (Cth) in connection with intelligence operations or decisions in connection with investigations of State offences that have a federal aspect from the obligation to provide reasons. The ACC was consulted about this exemption.

C.31 The ACC submitted there are clear reasons for retaining this exemption. Disclosure of information connected with an investigation would, in many cases, risk compromising ongoing ACC inquiries by disclosing elements of ACC intelligence about the relevant criminal activity. Disclosure may assist the group concerned to take counter measures. To avoid this from happening, a statement of reasons would need to be redacted resulting in a statement that would shed little light on the merits of the decision.<sup>929</sup>

C.32 The Council considers the current exemption in paragraph (ea) can be justified on the basis that providing reasons could interfere with the running of an investigation or inquiry and has the potential to fragment or frustrate another legal process which is already under way.

**Recommendation C9**

The exemption of decisions under the *Australian Crime Commission Act 2002* (Cth) in paragraph (ea) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

**Decisions relating to the administration of criminal justice**

C.33 Paragraph (e) exempts decisions relating to the administration of criminal justice from the obligation to provide reasons. In Report No 33 the Council recommended that s 13A should be expanded to protect from disclosure in a statement of reasons information concerning enforcement of the law or protection of public safety. In the current report, the Council recommends that a statement of reasons is not required to contain any matter that is of such a nature that its inclusion in a document would cause that document to be an exempt document under the *Freedom of Information Act 1982* (Cth) (*FOI Act*) (**Recommendation 14**).

<sup>929</sup> Australian Crime Commission, Submission No 5 (6 July 2011) 9.



## *Appendix C: Schedule 2 Exemptions*

C.34 The Criminal Justice Division of the Attorney-General's Department considered that the exemption in paragraph (e) is necessary. They submitted that the policy rationale for the exemption is that reasons for decisions relating to the administration of criminal justice often contain information that might prejudice law enforcement activities or might endanger the life or physical safety of persons. They noted that information affecting the enforcement of law and protection of public safety is specifically excluded from disclosure under s 37 of the *FOI Act*. In their opinion, the fair and efficient administration of criminal justice is premised upon the avoidance of delay. Requests under s 13 of the *ADJR Act* could frustrate this process.<sup>930</sup>

C.35 The Criminal Justice Division considered that the Council's previous proposed amendment to s 13A was not sufficient to protect information.<sup>931</sup> The Council now proposes to align s 13A with the exemption under the *FOI Act*.

C.36 Section 37 of the *FOI Act* provides that documents affecting the enforcement of law and protection of public safety are exempt from disclosure. Section 27 provides that:

- (1) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
  - (a) prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure, or possible failure, to comply with a law relating to taxation or prejudice the enforcement or proper administration of the law in a particular instance;
  - (b) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information, or the non-existence of a confidential source of information, in relation to the enforcement or administration of the law; or
  - (c) endanger the life or physical safety of any person.
- (2) A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to:
  - (a) prejudice the fair trial of a person or the impartial adjudication of a particular case;
  - (b) disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
  - (c) prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

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<sup>930</sup> Criminal Justice Division, Attorney-General's Department (Cth), comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (14 December 2011).

<sup>931</sup> Ibid.



## *Federal Judicial Review in Australia*

(2A) For the purposes of paragraph (1)(b), a person is taken to be a confidential source of information in relation to the enforcement or administration of the law if the person is receiving, or has received, protection under a program conducted under the auspices of the Australian Federal Police, or the police force of a State or Territory, for the protection of:

(d) witnesses; or

(e) people who, because of their relationship to, or association with, a witness need, or may need, such protection; or

(f) any other people who, for any other reason, need or may need, such protection.

(3) In this section, law means law of the Commonwealth or of a State or Territory.

C.37 The Council considers that these protections for information in the *FOI Act*, which the Council recommends be incorporated into the *ADJR Act* through an amendment to s 13A, would provide sufficient protection of information of concern.

C.38 The Criminal Justice Division are concerned about procedural delays of requiring the AFP to compile statements of reasons and assess them for redaction when required.<sup>932</sup> The Council notes that s 13A(2)(b) provides that a statement of reasons does not have to be provided at all if the statement would be false or misleading were the information not included. Decisions relating to the administration of criminal justice which result in a prosecution will ultimately be tested by a court in the course of a criminal trial. Requiring the AFP to produce reasons in relation to these decisions, even where information could be protected, would place a burden on the resources of the AFP, where other means are available of testing those decisions.

C.39 The Criminal Justice Division and the AFP are also concerned that the ability to request a statement of reasons would be used by some persons to frustrate the criminal justice process in matters not yet before the criminal courts. The disclosure of police activities before the resolution of an investigation, such as the arrest of a person, could undermine ongoing operations and compromise police methodology. Further, external oversight of operational activity is already available, including by independent issuing authority (in relation to warrants), and by the Ombudsman and ACLEI. Again, requiring the AFP to produce reasons for these decisions, even where the information could be protected, duplicates review processes and could place a burden on the resources of the AFP.<sup>933</sup>

C.40 The Council agrees that the production of reasons could unduly delay criminal justice processes.

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<sup>932</sup> Criminal Justice Division, Attorney-General's Department (Cth), comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (14 December 2011).

<sup>933</sup> Criminal Justice Division, Attorney-General's Department (Cth), additional comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (7 June 2012).

**Recommendation C10**

The exemption of decisions relating to the administration of criminal justice in paragraph (e) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed (in conjunction with the Council's recommended amendments to s 13A in **Recommendation 14**).

**Decisions in connection with the institution or conduct of proceedings in a civil court**

C.41 Paragraph (f) exempts from the obligation to provide reasons decisions relating in connection with the institution or conduct of proceedings in a civil court.

C.42 The Fair Work Ombudsman (FWO) submitted that the current exemptions in paragraph (f) of Schedule 2 of the *ADJR Act* are appropriate and should not be repealed.<sup>934</sup> They argued that, in certain circumstances, a statement of reasons may prejudice future investigations and operate as a means of unnecessary delay to an investigation. The FWO noted that the requirements in relation to the court procedures of pleadings, filing of evidence and discovery should not be replicated by requiring a statement of reasons to be produced.<sup>935</sup> They also noted that because of the exemption in Schedule 1 of the *ADJR Act*, the FWO has never relied on Schedule 2. The submission was made in the event that the *ADJR Act* would apply to the decisions made by the FWO.<sup>936</sup>

**Recommendation C11**

The exemption of decisions in connection with the institution or conduct of proceedings in a civil court in paragraph (f) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed (in conjunction with the Council's recommended amendments to s 13A in **Recommendation 14**).

**Financial decisions**

C.43 Schedule 2 of the *ADJR Act* contains a number of financial decisions that are exempt from the obligation to provide reasons.

*Consolidated Revenue Fund*

C.44 The Consolidated Revenue Fund is established under s 81 of the *Australian Constitution*. Paragraph (g) exempts decisions of the Finance Minister to issue money out of the Consolidated Revenue Fund. The Commonwealth views the Fund as 'self-executing', that is, all revenues or moneys form part of the Fund upon receipt, and there is no statutory basis for the Fund separate to the *Constitution*.

<sup>934</sup> Fair Work Ombudsman, Submission No 22 (1 July 2011) 1.

<sup>935</sup> Ibid 4.

<sup>936</sup> Ibid 1.

C.45 In Report No 33, the Council recommended that the exemption in paragraph (g) be moved to Schedule 1 of the *ADJR Act*. In recent consultations, the Department of Finance and Deregulation agreed with this recommendation.<sup>937</sup>

C.46 The Council considers that excluding decisions in paragraph (g) from the whole of the *ADJR Act* is justified on the basis that the decisions relate to the management of the national economy, do not directly affect the interests of individuals, and are likely to be most appropriately resolved in the High Court. In the 1991 report, the Council considered whether a decision of the Finance Minister to issue funds out of the Consolidated Revenue Fund would be justiciable, given that budget allocations are determined in an exhaustive process of consideration by Cabinet. In any event, the Council does not consider decisions in paragraph (g) should be subject to judicial review under the *ADJR Act*.

#### **Recommendation C12**

The exemption of decisions of the Finance Minister to issue money out of the Consolidated Revenue Fund in paragraph (g) should be moved from Schedule 2 to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

#### *Financial Management and Accountability Act*

C.47 Section 27 of the *Financial Management and Accountability Act 1997* (Cth) (*FMA Act*) provides that the Minister may issue a drawing right to an official authorising them to make a payment of public money, request the debiting of an amount against an appropriation, or debit an amount against an appropriation. Paragraph (h) of Schedule 2 exempts decisions made under s 27 of the *FMA Act* from the obligation to provide reasons.

C.48 The Council recommended in Report No 33 that paragraph (h), as it then read,<sup>938</sup> should be moved to Schedule 1. In recent consultations, the Department of Finance and Deregulation agreed with this recommendation.

C.49 For similar reasons to the Consolidation Revenue Fund exemption discussed above, the Council considers that excluding decisions in paragraph (h) from the whole of the *ADJR Act* is justified on the basis that the decisions relate to the management of the national economy, do not directly affect the interests of individuals, and are likely to be most appropriately resolved in the High Court. Furthermore, it is unclear who would have standing to apply for judicial review of a decision of the Minister under s 27 of the *FMA Act*.

<sup>937</sup> Department of Finance and Deregulation, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (22 November 2011) 1.

<sup>938</sup> At the time Report No 33 was published in 1991, paragraph (h) read 'decisions under section 32 or 36A of the *Audit Act 1901*'. The *Audit Act 1901* was repealed in 1997 and replaced with the *Financial Management and Accountability Act 1997*.

## Appendix C: Schedule 2 Exemptions

### Recommendation C13

The exemption of decisions under s 27 of the *Financial Management and Accountability Act 1997* (Cth) in paragraph (h) should be moved from Schedule 2 to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

### *Commonwealth Grants Commission*

C.50 The Commonwealth Grants Commission recommends to the Treasurer how the revenues raised from the Goods and Services Tax should be distributed to the States and Territories to achieve ‘horizontal fiscal equalisation’. Paragraph (i) of Schedule 2 exempts decisions of the Commonwealth Grants Commission relating to the allocation of funds from the obligation to provide reasons.

C.51 In Report No 33 the Council recommended to amend s 13(11) of the *ADJR Act* to exclude from the definition of decision, a decision the terms of which are required by an enactment to be laid before each House of Parliament. The Commission’s rationale is outlined in reports that are required to be tabled in Parliament. If s 13(11) were amended as expressed above, then the Commonwealth Grants Commission would be exempt from the obligation to provide reasons by operation of that section.

C.52 The Treasury supported the previous recommendation of the Council, that s 13(11) should be amended and paragraph (i) of Schedule 2 can be repealed. They noted that under the current administrative arrangements, the Commonwealth Grants Commission does not make decisions, but rather makes recommendations to the Treasurer who then decides as to the allocation of funds.<sup>939</sup>

C.53 In the current report, the Council recommends that a statement of reasons is not required to contain the notice of or a statement of reasons for a decision that is required by an enactment to be laid before either House of the Parliament, prior to the date on which that notice or statement of reasons is laid before a House of Parliament. This recommendation aligns with the *Freedom of Information Act* (**Recommendation 14**).

C.54 The Council’s recommended amendment would still allow an application to be made for a statement of reasons, but after the report was tabled in Parliament. The Council considers that it is appropriate for the requirements in the *ADJR Act* and the *Freedom of Information Act* to align in this particular case.

### Recommendation C14

The exemption of decisions of the Commonwealth Grants Commission relating to the allocation of funds in paragraph (i) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed (in conjunction with the Council’s recommended amendments to s 13A in **Recommendation 14**).

<sup>939</sup> The Treasury, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (16 December 2011).

*Reserve Bank of Australia*

C.55 Paragraph (l) exempts decisions of the Reserve Bank in connection with its banking operations, including individual open market operations and foreign exchange dealings, from the obligation to provide reasons.

C.56 The Council previously recommended that s 13A of the *ADJR Act* be amended to provide that the section applies in relation to any information to which s 13(1) relates, being information which would, or could reasonably be expected to, prejudice the ability of the Commonwealth Government to manage the Australian economy.

C.57 The Reserve Bank does not support the previous recommendation of the Council. They argued that amending s 13A would not cover the same field as the exemption in Schedule 2. The Reserve Bank submitted that the banking operations of their Banking Department are arguably not necessary to enable the Commonwealth Government to manage the Australian economy. Furthermore, they are carried out by the Reserve Bank of Australia, and not the Commonwealth Government. The open market and foreign exchange operations are also functions carried out and managed by the Reserve Bank of Australia and not the Commonwealth Government.<sup>940</sup>

C.58 The Reserve Bank of Australia submitted that a similar exemption to paragraph (l) in Schedule 2 is found in the *Freedom of Information Act*. This is in addition to a general exemption that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, have a substantial adverse effect on the Australian economy.<sup>941</sup> The Reserve Bank also argued that in the conduct of its commercial activities, for privacy law purposes, the Bank is treated as if it were a private sector organisation. For example, the Bank must comply with the National Privacy Principles and not the Information Privacy Principles which apply to the Commonwealth public sector.<sup>942</sup>

C.59 Contrary to the recommendation in Report No 33, the Council considers that the exemption in paragraph (l) is justified on the basis that disclosure of any information that would, or could reasonably be expected to, prejudice the ability of the Reserve Bank to manage the Australian economy or interfere with their commercial activities.

**Recommendation C15**

The exemption of decisions of the Reserve Bank of Australia in connection with its banking operations in paragraph (l) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

<sup>940</sup> Reserve Bank of Australia, Submission on proposal to remove Schedule 2 exemption under the *Administrative Decisions (Judicial Review) Act* (23 February 2012) 2.

<sup>941</sup> *Freedom of Information Act 1982* (Cth) s 47J.

<sup>942</sup> Reserve Bank of Australia, Submission on proposal to remove Schedule 2 exemption under the *Administrative Decisions (Judicial Review) Act* (23 February 2012) 5–6.

## Appendix C: Schedule 2 Exemptions

### *Recovery of moneys by the Commonwealth*

C.60 Paragraph (m) exempts from the obligation to provide reasons decisions in connection with the enforcement of judgments or orders for the recovery of moneys by the Commonwealth or by an officer of the Commonwealth.

C.61 The Council previously recommended in Report No 33 that s 13A be amended to provide that the section applies in relation to any information to which a request under s 13(1) relates, being information which would, or could reasonably be expected to, adversely affect an authority of the Commonwealth in respect of its competitive commercial activities.

C.62 The Department of Finance submitted that they support the amendment to s 13A of the *ADJR Act* and consequential removal of paragraph (m).<sup>943</sup>

C.63 The Council has, however, chosen to recommend that a statement of reasons is not required to contain any matter that is of such a nature that its inclusion in a document would cause that document to be an exempt document under the *FOI Act* (**Recommendation 14**). Section 47 of the *FOI Act* protects commercially valuable information from disclosure, and s 47D provides that ‘a document is conditionally exempt if its disclosure ... would have a substantial adverse effect on the financial or property interests of the Commonwealth’—meaning access should be given unless it would be contrary to the public interest. The Council considers that these exemptions are considered sufficient protection for Commonwealth commercial activities in the *FOI Act* context, and are therefore sufficient in the *ADJR Act* context.

C.64 The Department of Finance and Deregulation expressed concern about the scope of the Council’s proposed Recommendation 14, particularly as it compares with the decisions captured by the exemptions in paragraphs (k) and (m) of Schedule 2, and therefore requested consultation in relation to the drafting of any amendments to s 13A.<sup>944</sup>

#### **Recommendation C16**

The exemption of decisions in connection with the enforcement of judgments or orders for the recovery of moneys by the Commonwealth or by an officer of the Commonwealth in paragraph (m) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed (in conjunction with the Council’s recommended amendments to s 13A in **Recommendation 14**).

<sup>943</sup> Department of Finance and Deregulation, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (22 November 2011) 1.

<sup>944</sup> Department of Finance and Deregulation, additional comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (8 June 2012).

## Decisions of Tribunals or Authorities

### *Obsolete Tribunals*

C.65 Paragraph (j) exempts decisions of certain Tribunals from the obligation to provide reasons for decisions. As discussed above, the Academic Salaries Tribunal and Federal Police Arbitral Tribunal no longer exist.

C.66 The Defence Force Remuneration Tribunal was established in 1984 to inquire into and determine pay and pay related allowances for the Regular and Reserve members of the Australian Defence Force. Its functions are set out in ss 58F–58Y of the *Defence Force Act 1903* (Cth).

C.67 The Remuneration Tribunal is established under the *Remuneration Tribunal Act 1973* (Cth). The Tribunal is the independent statutory body that handles the remuneration of key Commonwealth offices.

C.68 The Council previously recommended that the Acts establishing the Tribunals should be amended to require the decisions of those Tribunals to be accompanied by a statement of reasons. In this case, s 13 would not apply given the operation of s 13(11).

C.69 The Council does not consider that the exemption in paragraph (j) is justified.

### **Recommendation C17**

The exemption of decisions of certain Tribunals in paragraph (j) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.

### *Decisions of Authorities*

C.70 Paragraph (k) exempts decisions of numerous boards or corporations from the obligation to provide reasons. In Report No 33, the Council recommended that s 13A of the *ADJR Act* be amended to provide that the section applies in relation to any information to which a request under s 13(1) relates, being information which would, or could reasonably be expected to, adversely affect an authority of the Commonwealth in respect of its competitive commercial activities.

C.71 The Department of Finance and Deregulation supported the Council's recommendation to amend s 13A. The Department supported extending the scope of s 13A and consequently repealing paragraph (k).<sup>945</sup>

C.72 The Council has, however, chosen to recommend that a statement of reasons is not required to contain any matter that is of such a nature that its inclusion in a document would cause that document to be an exempt document under the *FOI Act* (**Recommendation 14**). Section 47 of the *FOI Act* protects commercially valuable information from disclosure, and

<sup>945</sup> Department of Finance and Deregulation, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (22 November 2011) 1.



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s 47D provides that ‘a document is conditionally exempt if its disclosure ... would have a substantial adverse effect on the financial or property interests of the Commonwealth’—meaning access should be given unless it would be contrary to the public interest. The Council considers that these exemptions are sufficient protection for Commonwealth commercial activities in the *FOI Act* context, and are therefore sufficient in the *ADJR Act* context.

C.73 The Department of Finance and Deregulation expressed concern about the scope of the Council’s proposed Recommendation 14, particularly as it compares with the decisions captured by the exemptions in paragraphs (k) and (m) of Schedule 2, and therefore requested consultation in relation to the drafting of any amendments to s 13A.<sup>946</sup>

### Recommendation C18

The exemption of decisions of certain authorities in paragraph (k) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed (in conjunction with the Council’s recommended amendments to s 13A in **Recommendation 14**).

## Decisions relating to Employment

### *Members of Parliament (Staff) Act 1984* (Cth)

C.74 Decisions relating to engagement or termination of employment of staff or consultants under the *Members of Parliament (Staff) Act 1984* (Cth) (*Members of Parliament (Staff) Act*) are exempt from the obligation to provide reasons. The Act provides for automatic termination of employment of staff and consultants in the event the Parliamentarian ceases to hold office. The Act also provides for termination of employment by the Parliamentarian at any time.

C.75 The Council previously recommended in Report No 33 that paragraph (y) should be moved to Schedule 1 of the *ADJR Act* given the personal nature of the employment and the provision in the Act for termination at will. In recent consultations, the Department of Finance and Deregulation agreed with this recommendation.<sup>947</sup>

C.76 The Council considers that decisions relating to engagement or termination of staff or consultants under the *Members of Parliament (Staff) Act* should be exempt from the *ADJR Act* as a whole.

<sup>946</sup> Department of Finance and Deregulation, additional comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (8 June 2012).

<sup>947</sup> Department of Finance and Deregulation, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (22 November 2011) 2.

**Recommendation C19**

The exemption of decisions relating to engagement or termination of employment of staff or consultants under the *Members of Parliament (Staff) Act 1984* (Cth) in paragraph (y) should be moved from Schedule 2 to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

*Australian Public Service Employment*

C.77 Paragraphs (q), (r), (t), (u) and (w) exempt various decisions relating to employment in the Australian Public Service (APS) from the obligation to provide reasons. The Australian Public Service Commission (APSC) argued that it is Commonwealth policy that the APS, as a workforce, should be covered by the same arrangements as apply in the workforce generally. Therefore, the APSC considered that all the exemptions relating to APS employment, apart from paragraph (w), should be maintained.<sup>948</sup>

C.78 Paragraph (q) exempts decisions relating to personnel management of the APS, other than decisions relating to the particular characteristics or circumstances of a person, from review under the *ADJR Act*. Decisions that fall within the ambit of paragraph (q) relate to high level management decisions, particularly personnel policy decisions. Often, such decisions would not ordinarily be subject to review under the *ADJR Act*, as they are not made under an enactment.

C.79 In Report No 33, the Council recommended paragraph (q) should be repealed. The Council noted that for strategic staffing decisions that did not relate to a particular person, it would be difficult to establish the necessary standing to seek a statement of reasons. Otherwise, the Council considered that statements of reasons should be available to those affect.

C.80 The APSC did not support the previous recommendation by the Council. In their opinion, decisions to which paragraph (q) is directed are made without regard to the circumstances of a particular persons as they are policy decisions for the APS as a whole. Nevertheless, the decisions could cause an applicant or incumbent to feel ‘aggrieved’. In this instance, the APSC submitted that it is helpful to refer to an explicit exemption demonstrating that the individual does not have a right to a statement of reasons.<sup>949</sup>

C.81 Contrary to the recommendation made in Report No 33, the Council considers that paragraph (q) is justified on the basis that it is Commonwealth policy that APS employment is subject to the same arrangements as the wider workforce.

<sup>948</sup> Australian Public Service Commission, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (16 November 2011).

<sup>949</sup> Ibid.

**Recommendation C20**

The exemption of decisions relating to personnel management of the Australian Public Service, other than decisions relating to the particular characteristics or circumstances of a person, in paragraph (q) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

C.82 Paragraphs (r) and (t) exempt decisions relating to promotions, transfers, temporary performance of duties or appeals of such decisions (paragraph (r)) and decisions relating to the making of appointments or the engagement of employees in the public sector (paragraph (t)).

C.83 In Report No 33 the Council recommended paragraphs (r) and (t) should be repealed. The Council did not consider the arguments in relation to generating a significant workload should paragraph (r) exemption be removed to be valid. In relation to paragraph (t), the Council considered that because appointment and engagement decisions do not normally attract the principles of natural justice, this is not sufficient reason to exclude them from the obligation to provide reasons.

C.84 The APSC submitted that the exemptions in paragraphs (r) and (t) should continue. They argued that removing these exemptions would generate a significant workload, particularly with machinery of government changes. For example, machinery of government changes affected approximately 12,000 employees after the 2007 federal election. Furthermore, when Centrelink and Medicare merged with the Department of Human Services, approximately 34,000 employees were affected.<sup>950</sup>

C.85 The APSC noted that agencies are encouraged to provide feedback to unsuccessful applicants. Internal and external review is available of some of the decisions under the *Public Service Act 1999* (Cth) (*Public Service Act*) and in some circumstances, applicants are able to get access to personal material through requests under the *FOI Act*. The APSC argued these other avenues were sufficient for unsuccessful applications to be provided with reasons for the decision.<sup>951</sup>

C.86 Contrary to the recommendations made in Report No 33, the Council consider the exemptions in paragraphs (r) and (t) are justified on the basis that subjecting the decisions in these exemptions to the obligation to provide reasons would involve significant workload implications. This is particularly acute in times of machinery of government changes. Furthermore, the Council considers that paragraph (r) can be justified on the basis that providing a statement of reasons for the decisions in this exemption could potentially allow the *ADJR Act* to frustrate structural changes in the APS. This would be contrary to purpose of the *ADJR Act*.

<sup>950</sup> Australian Public Service Commission, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (16 November 2011).

<sup>951</sup> Ibid.

**Recommendation C21**

The exemptions of decisions relating to promotions, transfers, temporary performance of duties or appeals of such decisions and decisions relating to the making of appointments or the engagement of employees in the public sector in paragraphs (r) and (t) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

C.87 Paragraph (u) exempts decisions in connection with APS industrial matters. The Council previously recommend in Report No 33 that this exemption be removed, on the basis that where a decision deals with the rights or interests of a particular employee, a statement of reasons ought to be available. The Council also argued that paragraph (u) appears to be unnecessary in light of paragraph (a) of Schedule 1 (as it then read), exempting industrial relation disputes of the APS from the entire *ADJR Act*.

C.88 The APSC submitted that the exemption should continue. They noted that paragraph (a) of Schedule 1 relates only to decisions under the *Fair Work Act 2009* (Cth), while paragraph (u) refers more broadly to decisions in connection with industrial matters. The APSC argued that this exemption should be maintained in order to have comparable circumstances with the general workforce.<sup>952</sup>

**Recommendation C22**

The exemption of decisions in connection with Australian Public Service industrial matters in paragraph (u) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

C.89 Paragraph (w) exempts decisions relating to the making or terminating of appointments of Secretaries under the *Public Service Act* from the obligation to provide a statement of reasons. The Council previously recommended that paragraph (w) be moved to Schedule 1 of the *ADJR Act*.

C.90 The APSC supported the Council's previous recommendation. The APSC noted that proposed amendments to the *Public Service Act* would make decisions relating to the appointment and terminations of Secretaries decisions of the Governor-General.<sup>953</sup> This would automatically exempt these decisions from the operation of the *ADJR Act* by virtue of Schedule 1. The Council considers moving the exemption in paragraph (w) to Schedule 1 is justified.

**Recommendation C23**

The exemption of decisions relating to the making or terminating of appointments of Secretaries under the *Public Service Act 1999* (Cth) in paragraph (w) should be moved from Schedule 2 to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

<sup>952</sup> Australian Public Service Commission, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (16 November 2011).

<sup>953</sup> Ibid.

## Appendix C: Schedule 2 Exemptions

### *Australian Federal Police Act 1979 (Cth)*

C.91 Paragraph (z) exempts decision under ss 28, 40F and 40H of the *Australian Federal Police Act 1979* (Cth) from the obligation to provide reasons. Section 28 is the Commissioner of the AFP's power to terminate employment. Section 40F allows the Commissioner to make arrangements for the secondment of AFP employees to other bodies and s 40H allows the Commissioner to determine duties of an AFP officer.

C.92 The Council recommended in Report No 33 that paragraph (z) be repealed, consistent with its recommendations to repeal paragraph (r), discussed briefly above. The AFP submitted that the exemption should continue. The AFP stated that decisions under ss 40F and 40H relate to the Commissioner's general employment powers and unique command powers as the head of a disciplined police force. They argued that the current legislative arrangements recognise the distinctive nature of the AFP as a policing agency, where the Commissioner has unique command and employment powers. This puts the AFP on a different footing to other public sector agencies. The command powers are made within the unique backdrop of operation and administrative necessity, sometimes based on operationally sensitive information. Similar to deployments of the Australian Defence Force, the AFP submitted that deployments are necessary to meet law enforcement operational needs.<sup>954</sup>

C.93 The AFP submitted that decisions made under s 28 incorporate comprehensive administrative processes, including procedural fairness, despite being exempt from the obligation to provide reasons in Schedule 2 of the *ADJR Act*.<sup>955</sup>

C.94 Contrary to the previous recommendation, the Council considers the exemption in paragraph (z) is justified on the basis that there is an alternative scheme available which is as accessible as the *ADJR Act*. Furthermore, these cases are ordinarily extremely complex, and are best dealt with by the processes established by the AFP.

#### **Recommendation C24**

The exemption of decisions under ss 28, 40F and 40H of the *Australian Federal Police Act 1979* (Cth) in paragraph (z) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be retained.

### **Decisions under the *Civil Aviation Act 1988* (Cth)**

C.95 Paragraph (e) exempts from the obligation to provide reasons decisions under the *Civil Aviation Act 1988* (Cth) that relate to aircraft design, construction or maintenance of aircraft or otherwise related to aviation safety that was based on material either applied supplied on confidence or publication of which would reveal a trade secret.

<sup>954</sup> Australian Federal Police, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (21 November 2011) 2–4.

<sup>955</sup> Ibid 5.

C.96 In Report No 33, the Council considered that s 13A of the *ADJR Act* was sufficient to deal with the material that the exemption in paragraph (p) is directed at. In the current report, the Council recommends that a statement of reasons is not required to contain any matter that is of such a nature that its inclusion in a document would cause that document to be an exempt document under the *FOI Act* (**Recommendation 14**). Section 45 of the *FOI Act* exempts from disclosure documents containing material obtained in confidence, and s 47 of the *FOI Act* exempts from disclosure documents disclosing trade secrets or commercially valuable information

C.97 The Civil Aviation Safety Authority did not object to repealing paragraph (p) if s 13A allowed for the protection of trade secrets.<sup>956</sup>

#### **Recommendation C25**

The exemption of decisions under the *Civil Aviation Act 1988* (Cth) in paragraph (p) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed (in conjunction with the Council's recommended amendments to s 13A in **Recommendation 14**).

### **Decisions under the *Broadcasting Services Act 1992* (Cth)**

C.98 Paragraph (zc) exempts decisions of the Minister for Foreign Affairs under Part 8B of the *Broadcasting Services Act 1992* (Cth) from the obligation to provide reasons.

C.99 Part 8B of the Act is concerned with International Broadcasting licenses. Among other discretionary powers in Part 8B, the Minister has the power to object to allocating an international broadcasting license to an international broadcasting service if the objection would be in Australia's national interest.

C.100 The Department of Broadband Communications and the Digital Economy submitted the exemption in paragraph (zc) could be repealed. They argued that an Attorney-General's certificate under s 14 of the *ADJR Act* could provide a reasonable alternate mechanism for ensuring that sensitive information about Australia's international relations is not disclosed in a statement of reasons.<sup>957</sup>

C.101 The Council does not consider that the exemption in paragraph (zc) is justified, particularly given the operation of Attorney-General's certificates to protect information that would prejudice Australia's international relations.

<sup>956</sup> Civil Aviation Safety Authority, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (19 December 2011).

<sup>957</sup> Department of Broadband Communications and the Digital Economy, comments provided to the Administrative Review Council on existing exemptions from the *ADJR Act* (16 November 2011).

## *Appendix C: Schedule 2 Exemptions*

### **Recommendation C26**

The exemption of decisions of the Minister for Foreign Affairs under Part 8B of the *Broadcasting Services Act 1992* (Cth) in paragraph (zc) of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) should be removed.



# APPENDIX D: DECISIONS EXEMPT UNDER THE *ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) REGULATIONS 1985*

## Decisions relating to the Builders Labourers' Federation (paragraphs (a)-(d))

D.1 The exemptions relating to decisions made under industrial relations laws about the Builders Labourers Federation are no longer necessary. The Builders Labourers Federation is a union which has been permanently deregistered and no longer exists. Paragraph (a) refers to decisions by the Australian Conciliation and Arbitration Commission—a defunct body whose functions are now carried out by Fair Work Australia. The *Builders Labourers' Federation (Cancellation of Registration—Consequential Provisions) Act 1986* (Cth) (paragraph (b)) contains no decision-making powers. The *Conciliation and Arbitration Act 1904* (Cth) (paragraphs (c) and (d)) has been repealed.

### Recommendation D1

The exemptions of decisions made under industrial relations laws about the Builders Labourers Federation in paragraphs (a)–(d) of the *Administrative Decisions (Judicial Review) Regulations 1985* (Cth) should be removed.

## Decisions under the *Parliamentary Commission of Inquiry Act 1986* (Cth) (paragraph (e))

D.2 The *Parliamentary Commission of Inquiry Act 1986* (Cth) has been repealed and is no longer necessary.

### Recommendation D2

The exemption of decisions under the *Parliamentary Commission of Inquiry Act 1986* (Cth) in paragraph (e) of the *Administrative Decisions (Judicial Review) Regulations 1985* (Cth) should be removed.

## Decisions under certain Australian Capital Territory Ordinances (paragraph (f))

D.3 These exemptions are not necessary due to the operation of s 3A of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), which states that ACT enactments are not enactments for the purpose of the *ADJR Act*.

**Recommendation D3**

The exemption of decisions under certain Australian Capital Territory Ordinances in paragraph (f) of the *Administrative Decisions (Judicial Review) Regulations 1985* (Cth) should be removed.

**Decisions under provisions of the law of Western Australia as in force in external Territories (paragraph (g))**

D.4 Paragraph (g) provides exemptions for decisions under provisions of the law of Western Australia as in force in:

- the Territory of Christmas Island under section 8A of the *Christmas Island Act 1958* (Cth) (*Christmas Island Act*); and
- the Territory of Cocos (Keeling) Islands under section 8A of the *Cocos (Keeling) Islands Act 1955* (Cth) (*Cocos (Keeling) Islands Act*);

except for in relation to decisions of certain bodies or persons.

D.5 Bodies or persons whose decisions will be subject to the *ADJR Act* are largely bodies or persons employed by the Commonwealth, or appointed or established under Commonwealth statutes. The provision therefore operates to ensure that the sections of the *Christmas Island Act* and the *Cocos (Keeling) Islands Act* which apply Western Australian law in the Territories do not expand the scope of *ADJR Act* review to bodies or persons not associated with the Commonwealth making decisions under non-Commonwealth law.

**Recommendation D4**

The exemption of decisions under provisions of the law of Western Australia as in force in external Territories in paragraph (g) of the *Administrative Decisions (Judicial Review) Regulations 1985* (Cth) should be retained, but moved to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

**Quarantine decisions (paragraphs (h) and (i))**

D.6 These decisions relate to epidemics caused by, or in danger of being caused by, diseases or pests. The Governor-General can proclaim an epidemic under s 2B(1) and the Minister can then make declarations or take actions ‘as he or she thinks necessary to control and eradicate the epidemic, or to remove the danger of the epidemic, by quarantine measures or measures incidental to quarantine’ under s 2B(2). Paragraph (h) exempts any actions taken or directions given from review under the *ADJR Act*.

D.7 Section 3 gives the Minister the power to give directions to authorise persons who are the executive heads of national response agencies to take actions and give directions to

control and eradicate the epidemic. Paragraph (i) makes those decisions or directions of authorised persons exempt from review under the *ADJR Act*.

D.8 Given that an epidemic situation is a situation of national emergency, review is appropriately limited to a constitutional minimum because:

- there is a risk posed to public safety, and
- given the national significance of the decisions, the matter is appropriately dealt with by the High Court.

#### **Recommendation D5**

The exemptions of quarantine decisions in paragraphs (h) and (i) of the *Administrative Decisions (Judicial Review) Regulations 1985* (Cth) should be retained, but moved to Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

# APPENDIX E: SUBMISSIONS

The Council received submissions from the individuals and organisations:

1. Mark Aronson
2. Superannuation Complaints Tribunal
3. Department of Education, Employment and Workplace Relations
4. Department of Defence
5. Australian Crime Commission
6. Dr Peter Billings and Dr Anthony E Cassimatis
7. NSW Young Lawyers
8. Greg Weeks
9. Australian Network of National Environmental Defenders Offices
10. Migration Review Tribunal–Refugee Review Tribunal
11. Department of Immigration and Citizenship
12. Administrative Appeals Tribunal
13. Australian Taxation Office
14. Victorian Legal Aid
15. Commonwealth Ombudsman
16. Department of Agriculture, Fisheries and Forestry
17. Office of the Australian Information Commissioner
18. Public Interest Advocacy Centre
19. Department of Finance and Deregulation
20. Dr Paul Latimer
21. Attorney-General’s Department
22. Fair Work Ombudsman
23. Law Council of Australia

Copies of submissions are available from the Council’s website at [www.arc.ag.gov.au](http://www.arc.ag.gov.au) or by contacting the Secretariat:

The Executive Director  
Administrative Review Council  
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## APPENDIX F: CONSULTATIONS

The following individuals and organisations were consulted in the preparation of this report:

<i>Organisation</i>	<i>Name</i>	<i>Location</i>
Clayton Utz	Ms S Sheppard, Partner	Melbourne
Law Institute of Victoria	Mr E Rodan OAM and Ms K Miller	Melbourne
Social Security Appeals Tribunal	Ms J McDonnell, Principal Member	Melbourne
Administrative Appeals Tribunal	Mr P Kellow, Registrar	Sydney
	Mr C Matthies, A/g Registrar, Administrative Appeals Tribunal	Sydney
	Mr J Cabarus, A/g Manager, Research and Policy, Administrative Appeals Tribunal	Sydney
Sparke Helmore Lawyers	Ms B Rayment and Mr M Alderton	Sydney
	Ms M Brennan	Canberra
Victorian Bar	Ms D Mortimer SC	Melbourne
	Mr R Niall SC	Melbourne
	Mr S Donaghue SC	Melbourne
Rule of Law Institute	Mr R Gilbert	Sydney
New South Wales Bar	Mr G Kennett SC	Sydney
	Mr S Lloyd SC	Sydney
	Dr K Stern	Sydney
	Mr Neil Williams SC	Sydney
Public Interest Advocacy Centre	Mr E Santow and Ms J Namey	Sydney
University of New South Wales (UNSW)	Emeritus Professor Mark Aronson	Sydney
Gilbert & Tobin Centre of Public Law UNSW	Mr Greg Weeks	Sydney
DLA Piper Australia	Mr M Will	Canberra
Solicitor-General for Australia	Mr S Gageler SC	Canberra
Minter Ellison Lawyers	Ms S Tongue	Canberra
—	Sir A Mason	Sydney
High Court of Australia	—	Canberra

## *Appendix F: Consultations*

The following government departments and agencies were consulted:

1. Attorney-General's Department
2. Australian Transaction Reports and Analysis Centre (AUSTRAC)
3. Australian Commission for Law Enforcement Integrity
4. Australian Crime Commission
5. Australian Customs and Border Protection Service
6. Australian Electoral Commission
7. Australian Federal Police
8. Australian Prudential Regulation Authority
9. Australian Public Service Commission
10. Australian Securities and Investments Commission
11. Australian Taxation Office
12. Centrelink
13. Civil Aviation Safety Authority
14. Department of Broadband, Communications and the Digital Economy
15. Department of Defence
16. Department of Education, Employment and Workplace Relations
17. Department of Families and Housing, Community Services and Indigenous Affairs
18. Department of Finance and Deregulation
19. Department of Foreign Affairs and Trade
20. Department of Immigration and Citizenship
21. Export Finance and Insurance Corporation
22. Fair Work Australia
23. Office of the Australian Building and Construction Commissioner
24. Reserve Bank of Australia
25. The Treasury

# APPENDIX G: KEY *ADJR* ACT PROVISIONS

## 3 Interpretation

- (1) In this Act, unless the contrary intention appears:

...

***decision to which this Act applies*** means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):

- (a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of ***enactment***; or
- (b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of ***enactment***;

other than:

- (c) a decision by the Governor-General; or
- (d) a decision included in any of the classes of decisions set out in Schedule 1.

Note: Regulations for the purposes of section 19 can declare that decisions that are covered by this definition are not subject to judicial review under this Act.

***duty*** includes a duty imposed on a person in his or her capacity as a servant of the Crown.

***enactment*** means:

- (a) an Act, other than:
  - (i) the *Commonwealth Places (Application of Laws) Act 1970*; or
  - (ii) the *Northern Territory (Self-Government) Act 1978*; or
  - (iii) an Act or part of an Act that is not an enactment because of section 3A (certain legislation relating to the ACT); or
- (b) an Ordinance of a Territory other than the Australian Capital Territory or the Northern Territory; or
- (c) an instrument (including rules, regulations or by-laws) made under such an Act or under such an Ordinance, other than any such instrument that is not an enactment because of section 3A; or
- (ca) an Act of a State, the Australian Capital Territory or the Northern Territory, or a part of such an Act, described in Schedule 3; or
- (cb) an instrument (including rules, regulations or by-laws) made under an Act or part of an Act covered by paragraph (ca); or
- (d) any other law, or a part of a law, of the Northern Territory declared by the regulations, in accordance with section 19A, to be an enactment for the purposes of this Act;

and, for the purposes of paragraph (a), (b), (c), (ca) or (cb), includes a part of an enactment.

Note: Regulations for the purposes of section 19B can amend Schedule 3 (see section 19B).



## *Appendix G: Key ADJR Act Provisions*

**failure**, in relation to the making of a decision, includes a refusal to make the decision.

...

**order of review**, in relation to a decision, in relation to conduct engaged in for the purpose of making a decision or in relation to a failure to make a decision, means an order on an application made under section 5, 6 or 7 in respect of the decision, conduct or failure.

...

- (2) In this Act, a reference to the making of a decision includes a reference to:
  - (a) making, suspending, revoking or refusing to make an order, award or determination;
  - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
  - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
  - (d) imposing a condition or restriction;
  - (e) making a declaration, demand or requirement;
  - (f) retaining, or refusing to deliver up, an article; or
  - (g) doing or refusing to do any other act or thing;and a reference to a failure to make a decision shall be construed accordingly.
- (3) Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.
- (4) In this Act:
  - (a) a reference to a person aggrieved by a decision includes a reference:
    - (i) to a person whose interests are adversely affected by the decision; or
    - (ii) in the case of a decision by way of the making of a report or recommendation—to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and
  - (b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.
- (5) A reference in this Act to conduct engaged in for the purpose of making a decision includes a reference to the doing of any act or thing preparatory to the making of the decision, including the taking of evidence or the holding of an inquiry or investigation.

## **5 Applications for review of decisions**

- (1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision on any one or more of the following grounds:
  - (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
  - (b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;
  - (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
  - (d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;
  - (e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;
  - (f) that the decision involved an error of law, whether or not the error appears on the record of the decision;
  - (g) that the decision was induced or affected by fraud;
  - (h) that there was no evidence or other material to justify the making of the decision;
  - (j) that the decision was otherwise contrary to law.
- (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
  - (a) taking an irrelevant consideration into account in the exercise of a power;
  - (b) failing to take a relevant consideration into account in the exercise of a power;
  - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
  - (d) an exercise of a discretionary power in bad faith;
  - (e) an exercise of a personal discretionary power at the direction or behest of another person;
  - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
  - (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
  - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
  - (j) any other exercise of a power in a way that constitutes abuse of the power.
- (3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
  - (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which he or she was entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or
  - (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.

## **6 Applications for review of conduct related to making of decisions**

- (1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the conduct on any one or more of the following grounds:
  - (a) that a breach of the rules of natural justice has occurred, is occurring, or is likely to occur, in connection with the conduct;
  - (b) that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed;
  - (c) that the person who has engaged, is engaging, or proposes to engage, in the conduct does not have jurisdiction to make the proposed decision;
  - (d) that the enactment in pursuance of which the decision is proposed to be made does not authorize the making of the proposed decision;
  - (e) that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;
  - (f) that an error of law had been, is being, or is likely to be, committed in the course of the conduct or is likely to be committed in the making of the proposed decision;
  - (g) that fraud has taken place, is taking place, or is likely to take place, in the course of the conduct;
  - (h) that there is no evidence or other material to justify the making of the proposed decision;
  - (j) that the making of the proposed decision would be otherwise contrary to law.
- (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:
  - (a) taking an irrelevant consideration into account in the exercise of a power;
  - (b) failing to take a relevant consideration into account in the exercise of a power;
  - (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
  - (d) an exercise of a discretionary power in bad faith;
  - (e) an exercise of a personal discretionary power at the direction or behest of another person;
  - (f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;
  - (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
  - (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and
  - (j) any other exercise of a power in a way that constitutes abuse of the power.
- (3) The ground specified in paragraph (1)(h) shall not be taken to be made out unless:
  - (a) the person who proposes to make the decision is required by law to reach that decision only if a particular matter is established, and there is no evidence or other material (including facts of which he or she is entitled to take notice)

from which he or she can reasonably be satisfied that the matter is established;  
or

- (b) the person proposes to make the decision on the basis of the existence of a particular fact, and that fact does not exist.

## **7 Applications in respect of failures to make decisions**

(1) Where:

- (a) a person has a duty to make a decision to which this Act applies;
- (b) there is no law that prescribes a period within which the person is required to make that decision; and
- (c) the person has failed to make that decision;

a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.

(2) Where:

- (a) a person has a duty to make a decision to which this Act applies;
- (b) a law prescribes a period within which the person is required to make that decision; and
- (c) the person failed to make that decision before the expiration of that period;

a person who is aggrieved by the failure of the first-mentioned person to make the decision within that period may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the failure to make the decision within that period on the ground that the first-mentioned person has a duty to make the decision notwithstanding the expiration of that period.

## **10 Rights conferred by this Act to be additional to other rights**

(1) The rights conferred by sections 5, 6 and 7 on a person to make an application to the Federal Court or the Federal Magistrates Court in respect of a decision, in respect of conduct engaged in for the purpose of making a decision or in respect of a failure to make a decision:

- (a) are in addition to, and not in derogation of, any other rights that the person has to seek a review, whether by the court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure; and
- (b) shall be disregarded for the purposes of the application of subsection 6(3) of the *Ombudsman Act 1976* and section 40TF of the *Australian Federal Police Act 1979*.

(2) Notwithstanding subsection (1):

- (a) the Federal Court or the Federal Magistrates Court, or any other court, may, in a proceeding instituted otherwise than under this Act, in its discretion, refuse to grant an application for a review of a decision, conduct engaged in for the purpose of making a decision, or a failure to make a decision, for the reason that an application has been made to the Federal Court or the Federal Magistrates Court under section 5, 6 or 7 in respect of that decision, conduct or failure; and
- (b) the Federal Court or the Federal Magistrates Court may, in its discretion, refuse to grant an application under section 5, 6 or 7 that was made to the court in

## *Appendix G: Key ADJR Act Provisions*

respect of a decision, in respect of conduct engaged in for the purpose of making a decision, or in respect of a failure to make a decision, for the reason:

- (i) that the applicant has sought a review by the court, or by another court, of that decision, conduct or failure otherwise than under this Act; or
  - (ii) that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the court, by another court, or by another tribunal, authority or person, of that decision, conduct or failure.
- (3) In this section, **review** includes a review by way of reconsideration, re-hearing, appeal, the grant of an injunction or of a prerogative or statutory writ or the making of a declaratory or other order.

### **13 Reasons for decision may be obtained**

- (1) Where a person makes a decision to which this section applies, any person who is entitled to make an application to the Federal Court or the Federal Magistrates Court under section 5 in relation to the decision may, by notice in writing given to the person who made the decision, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.
- (2) Where such a request is made, the person who made the decision shall, subject to this section, as soon as practicable, and in any event within 28 days, after receiving the request, prepare the statement and furnish it to the person who made the request.
- (3) Where a person to whom a request is made under subsection (1) is of the opinion that the person who made the request was not entitled to make the request, the first-mentioned person may, within 28 days after receiving the request:
  - (a) give to the second-mentioned person notice in writing of his or her opinion; or
  - (b) apply to the Federal Court or the Federal Magistrates Court under subsection (4A) for an order declaring that the person who made the request was not entitled to make the request.
- (4) Where a person gives a notice under subsection (3), or applies to the Federal Court or the Federal Magistrates Court under subsection (4A), with respect to a request, the person is not required to comply with the request unless:
  - (a) the Federal Court or the Federal Magistrates Court, on an application under subsection (4A), declares that the person who made the request was entitled to make the request; or
  - (b) the person who gave the notice under subsection (3) has applied to the Federal Court or the Federal Magistrates Court under subsection (4A) for an order declaring that the person who made the request was not entitled to make the request and the court refuses that application;and, in either of those cases, the person who gave the notice shall prepare the statement to which the request relates and furnish it to the person who made the request within 28 days after the decision of the court.
- (4A) The Federal Court or the Federal Magistrates Court may, on the application of:
  - (a) a person to whom a request is made under subsection (1); or

- (b) a person who has received a notice under subsection (3);  
make an order declaring that the person who made the request concerned was, or was not, entitled to make the request.
- (5) A person to whom a request for a statement in relation to a decision is made under subsection (1) may refuse to prepare and furnish the statement if:
- (a) in the case of a decision the terms of which were recorded in writing and set out in a document that was furnished to the person who made the request—the request was not made on or before the twenty-eighth day after the day on which that document was so furnished; or
  - (b) in any other case—the request was not made within a reasonable time after the decision was made;
- and in any such case the person to whom the request was made shall give to the person who made the request, within 14 days after receiving the request, notice in writing stating that the statement will not be furnished to him or her and giving the reason why the statement will not be so furnished.
- (6) For the purposes of paragraph (5)(b), a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was made if the Federal Court or the Federal Magistrates Court, on application by the person who made the request, declares that the request was made within a reasonable time after the decision was made.
- (7) If the Federal Court or the Federal Magistrates Court, upon application for an order under this subsection made to it by a person to whom a statement has been furnished in pursuance of a request under subsection (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the court may order the person who furnished the statement to furnish to the person who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons.
- (8) The regulations may declare a class or classes of decisions to be decisions that are not decisions to which this section applies.
- (9) Regulations made under subsection (8) may specify a class of decisions in any way, whether by reference to the nature or subject matter of the decisions, by reference to the enactment or provision of an enactment under which they are made, by reference to the holder of the office by whom they are made, or otherwise.
- (10) A regulation made under subsection (8) applies only in relation to decisions made after the regulation takes effect.
- (11) In this section, ***decision to which this section applies*** means a decision that is a decision to which this Act applies, but does not include:
- (a) a decision in relation to which section 28 of the *Administrative Appeals Tribunal Act 1975* applies;
  - (b) a decision that includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision; or



## *Appendix G: Key ADJR Act Provisions*

- (c) a decision included in any of the classes of decision set out in Schedule 2.

### **13A Certain information not required to be disclosed**

- (1) This section applies in relation to any information to which a request made to a person under subsection 13(1) relates, being information that:
  - (a) relates to the personal affairs or business affairs of a person, other than the person making the request; and
  - (b) is information:
    - (i) that was supplied in confidence;
    - (ii) the publication of which would reveal a trade secret;
    - (iii) that was furnished in compliance with a duty imposed by an enactment; or
    - (iv) the furnishing of which in accordance with the request would be in contravention of an enactment, being an enactment that expressly imposes on the person to whom the request is made a duty not to divulge or communicate to any person, or to any person other than a person included in a prescribed class of persons, or except in prescribed circumstances, information of that kind.
- (2) Where a person has been requested in accordance with subsection 13(1) to furnish a statement to a person:
  - (a) the first-mentioned person is not required to include in the statement any information in relation to which this section applies; and
  - (b) where the statement would be false or misleading if it did not include such information—the first-mentioned person is not required by section 13 to furnish the statement.
- (3) Where, by reason of subsection (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement:
  - (a) in a case where information is not included in a statement—stating that the information is not so included and giving the reason for not including the information; or
  - (b) in a case where a statement is not furnished—stating that the statement will not be furnished and giving the reason for not furnishing the statement.
- (4) Nothing in this section affects the power of the Federal Court or the Federal Magistrates Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the court.

### **14 Certification by Attorney-General concerning the disclosure of information**

- (1) If the Attorney-General certifies, by writing signed by him or her, that the disclosure of information concerning a specified matter would be contrary to the public interest:
  - (a) by reason that it would prejudice the security, defence or international relations of Australia;
  - (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
  - (c) for any other reason specified in the certificate that could form the basis for a claim in a judicial proceeding that the information should not be disclosed;



the following provisions of this section have effect.

- (2) Where a person has been requested in accordance with section 13 to furnish a statement to a person:
  - (a) the first-mentioned person is not required to include in the statement any information in respect of which the Attorney-General has certified in accordance with subsection (1) of this section; and
  - (b) where the statement would be false or misleading if it did not include such information—the first-mentioned person is not required by that section to furnish the statement.
- (3) Where, by reason of subsection (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement:
  - (a) in a case where information is not included in a statement—stating that the information is not so included and giving the reason for not including the information; or
  - (b) in a case where a statement is not furnished—stating that the statement will not be furnished and giving the reason for not furnishing the statement.
- (4) Nothing in this section affects the power of the Federal Court or the Federal Magistrates Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the court.

## **16 Powers of the Federal Court and the Federal Magistrates Court in respect of applications for order of review**

- (1) On an application for an order of review in respect of a decision, the Federal Court or the Federal Magistrates Court may, in its discretion, make all or any of the following orders:
  - (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;
  - (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court thinks fit;
  - (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
  - (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.
- (2) On an application for an order of review in respect of conduct that has been, is being, or is proposed to be, engaged in for the purpose of the making of a decision, the Federal Court or the Federal Magistrates Court may, in its discretion, make either or both of the following orders:
  - (a) an order declaring the rights of the parties in respect of any matter to which the conduct relates;
  - (b) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.

### *Appendix G: Key ADJR Act Provisions*

- (3) On an application for an order of review in respect of a failure to make a decision, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Federal Court or the Federal Magistrates Court may, in its discretion, make all or any of the following orders:
  - (a) an order directing the making of the decision;
  - (b) an order declaring the rights of the parties in relation to the making of the decision;
  - (c) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice between the parties.
- (4) The Federal Court or the Federal Magistrates Court may at any time, of its own motion or on the application of any party, revoke, vary, or suspend the operation of, any order made by it under this section.

## APPENDIX H: *ADJR ACT* SCHEDULE 1

- (a) decisions under the *Fair Work Act 2009*, the *Fair Work (Registered Organisations) Act 2009*, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, the *Workplace Relations Act 1996* or the *Building and Construction Industry Improvement Act 2005*;
- (c) decisions under the *Coal Industry Act 1946*, other than decisions of the Joint Coal Board;
- (d) decisions under any of the following Acts:
  - Australian Security Intelligence Organisation Act 1956*
  - Intelligence Services Act 2001*
  - Australian Security Intelligence Organisation Act 1979*
  - Inspector-General of Intelligence and Security Act 1986*
  - Telecommunications (Interception and Access) Act 1979*
  - Telephonic Communications (Interception) Act 1960*;
- (daa) decisions of the Attorney-General under section 58A, or subsection 581(3), of the *Telecommunications Act 1997*;
- (dab) decisions of the Attorney-General under section 104.2 of the *Criminal Code*;
- (dac) decisions under Division 105 of the *Criminal Code*;
- (da) a privative clause decision within the meaning of subsection 474(2) of the *Migration Act 1958*;
- (db) a purported privative clause decision within the meaning of section 5E of the *Migration Act 1958*;
- (e) decisions making, or forming part of the process of making, or leading up to the making of, assessments or calculations of tax, charge or duty, or decisions disallowing objections to assessments or calculations of tax, charge or duty, or decisions amending, or refusing to amend, assessments or calculations of tax, charge or duty, under any of the following Acts:
  - A New Tax System (Goods and Services Tax) Act 1999*
  - A New Tax System (Luxury Car Tax) Act 1999*
  - A New Tax System (Wine Equalisation Tax) Act 1999*
  - Customs Act 1901*
  - Customs Tariff Act 1995*
  - Excise Act 1901*
  - Fringe Benefits Tax Assessment Act 1986*
  - Fuel Tax Act 2006*
  - Income Tax Assessment Act 1936*
  - Income Tax Assessment Act 1997*
  - Petroleum Resource Rent Tax Assessment Act 1987*
  - Superannuation Guarantee (Administration) Act 1992*
  - Taxation Administration Act 1953*, but only so far as the decisions are made under Part 3-10 in Schedule 1 to that Act
  - Training Guarantee (Administration) Act 1990*
  - Trust Recoupment Tax Assessment Act 1985*;
- (ga) decisions under section 14ZY of the *Taxation Administration Act 1953* disallowing objections to assessments or calculations of tax, charge or duty;

## Appendix H: ADJR Act Schedule 1

- (gaa) decisions of the Commissioner of Taxation under Subdivision 268-B or section 268-35 in Schedule 1 to the *Taxation Administration Act 1953*;  
Note: Subdivision 268-B and section 268-35 empower the Commissioner to make, reduce and revoke estimates of certain liabilities.
- (gb) decisions making, or forming part of the process of making, or leading up to the making of, assessments under Division 2 of Part 5 of the *Renewable Energy (Electricity) Act 2000* or decisions disallowing objections to such assessments or decisions amending or refusing to amend such assessments;
- (h) decisions under the *Foreign Acquisitions and Takeovers Act 1975*;
- (ha) decisions of the Minister under Division 1 of Part 7.4 of the *Corporations Act 2001*;
- (hb) decisions of the SEGC under Part 7.5 of the *Corporations Act 2001*;
- (hc) decisions under Division 3 of Part VC of the *Insurance Act 1973*, except so far as they relate to either of the following matters:
  - (i) whether persons are covered by determinations under section 62ZZ of that Act;
  - (ii) determinations under subsection 62ZZJ(2) of that Act;
- (hd) decisions under Subdivision C of Division 2AA of Part II of the *Banking Act 1959*, except so far as they relate to whether account-holders have protected accounts with ADIs;
- (j) decisions, or decisions included in a class of decisions, under the Banking (Foreign Exchange) Regulations in respect of which the Treasurer has certified, by instrument in writing, that the decision or any decision included in the class, as the case may be, is a decision giving effect to the foreign investment policy of the Commonwealth Government;
- (l) decisions of the National Workplace Relations Consultative Council;
- (o) decisions under the *Defence Force Discipline Act 1982*;
- (p) decisions under section 42 of the *Customs Act 1901* to require and take securities in respect of duty that may be payable under the *Customs Tariff (Anti-Dumping) Act 1975*;
- (q) decisions under subsection 25(1) or Part IIIA of the *Commonwealth Electoral Act 1918*;
- (qa) decisions under section 176 or 248 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*;
- (r) decisions under the *Extradition Act 1988*;
- (s) determinations made by the Child Support Registrar under Part 6A of the *Child Support (Assessment) Act 1989*;
- (t) decisions under an enactment of Qantas Airways Limited or a company that is a subsidiary of that company;
- (u) decisions of Snowy Mountains Engineering Corporation Limited or a body corporate that is a subsidiary of that body corporate;
- (v) decisions of CSL Limited or a company that is a subsidiary of that company;
- (va) decisions of Telstra Corporation Limited or a company that is a subsidiary of that company;
- (w) decisions under the *Witness Protection Act 1994*;

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- (wa) decisions under section 34B or 34D of the *Australian Crime Commission Act 2002*;
- (x) decisions under subsection 60A(2B) of the *Australian Federal Police Act 1979*;
- (xa) decisions to prosecute persons for any offence against a law of the Commonwealth, a State or a Territory;  
Note: An application under this Act in relation to other criminal justice process decisions cannot be heard or determined in certain circumstances: see section 9A.
- (xb) decisions of the Attorney-General under Part II or III of the *Transfer of Prisoners Act 1983* refusing applications or requests, or refusing to give consent, on the ground that, or on grounds that include the ground that, refusal is necessary in the interests of security (within the meaning of that Act);
- (xc) decisions of the Attorney-General under Part IV of the *Transfer of Prisoners Act 1983*;
- (y) decisions of the Administrative Appeals Tribunal (other than decisions made on review of decisions of the Australian Archives) made on a review that is required by the *Administrative Appeals Tribunal Act 1975* to be conducted by the Security Appeals Division of that Tribunal;
- (ya) decisions of a proceeds of crime authority or an approved examiner under Part 3-1 of the *Proceeds of Crime Act 2002*;
- (yb) decisions of a proceeds of crime authority to apply for an order under the *Proceeds of Crime Act 2002*;
- (yc) decisions of a proceeds of crime authority to transfer to another proceeds of crime authority responsibility for an application for a principal order, or a principal order, under section 315B of the *Proceeds of Crime Act 2002*;
- (za) decisions under Part VIIIB of the *Judiciary Act 1903* (which relates to the Australian Government Solicitor);
- (zb) decisions of Snowy Hydro Limited or a body corporate that is a subsidiary of Snowy Hydro Limited;
- (zd) the following decisions under the *Family Law Act 1975*:
  - (i) decisions of the Chief Judge or the Deputy Chief Judge in the exercise of, or in assisting in the exercise of, the functions or powers mentioned in subsection 21B(1A) of that Act;
  - (ii) decisions of the Chief Judge or the Attorney-General whether to consent as mentioned in paragraph 22(2AAA)(a) of that Act;
- (ze) the following decisions under the *Federal Court of Australia Act 1976*:
  - (i) decisions of the Chief Justice in the exercise of the functions or powers mentioned in subsection 15(1AA) of that Act;
  - (ii) decisions of the Chief Justice or the Attorney-General whether to consent as mentioned in paragraph 6(3)(a) of that Act;
- (zf) decisions of the Chief Federal Magistrate in the exercise of the functions or powers mentioned in subsection 12(3) or (4) of the *Federal Magistrates Act 1999*.

## APPENDIX I: *ADJR ACT* SCHEDULE 2

- (a) decisions in connection with, or made in the course of, redress of grievances, or redress of wrongs, with respect to members of the Defence Force;
- (b) decisions in connection with personnel management (including recruitment, training, promotion and organization) with respect to the Defence Force, including decisions relating to particular persons;
- (c) decisions under any of the following Acts:
  - Consular Privileges and Immunities Act 1972*
  - Diplomatic Privileges and Immunities Act 1967*
  - International Organisations (Privileges and Immunities) Act 1963*;
- (d) decisions under the *Migration Act 1958*, being:
  - (i) decisions under section 11Q, other than:
    - (A) a decision relating to a person who, at the time of the decision, was, within the meaning of that Act, the holder of a valid visa; or
    - (B) a decision relating to a person who, having entered Australia within the meaning of that Act, was in Australia at the time of the decision;
  - (ii) decisions in connection with the issue or cancellation of visas;
  - (iii) decisions whether a person is a person referred to in paragraph (b) of the definition of **exempt non-citizen** in subsection 5(1) of that Act; or
  - (iv) decisions relating to a person who, having entered Australia as a diplomatic or consular representative of another country, a member of the staff of such a representative or the spouse, de facto partner or a dependent relative of such a representative, was in Australia at the time of the decision (for the purposes of this subparagraph, **enter Australia**, **spouse**, **de facto partner** and relative have the same meanings as in that Act);
- (da) decisions of the Attorney-General to give:
  - (i) notice under section 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*; or
  - (ii) a certificate under section 26, 28, 38F or 38H of that Act;
- (db) decisions of the Minister appointed by the Attorney-General under section 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004* to give:
  - (i) notice under section 6A of that Act; or
  - (ii) a certificate under section 38F or 38H of that Act;
- (dc) decisions under subsection 8(4) or 9(4) of the *Parliamentary Joint Committee on Law Enforcement Act 2010*;
- (e) decisions relating to the administration of criminal justice, and, in particular:
  - (i) decisions in connection with the investigation, committal for trial or prosecution of persons for any offences against a law of the Commonwealth or of a Territory;
  - (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
  - (iii) decisions in connection with the issue of warrants, including search warrants and seizure warrants, under a law of the Commonwealth or of a Territory;

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- (iv) decisions under a law of the Commonwealth or of a Territory requiring the production of documents, the giving of information or the summoning of persons as witnesses;
- (v) decisions in connection with an appeal (including an application for a new trial or a proceeding to review or call in question the proceedings, decision or jurisdiction of a court or judge) arising out of the prosecution of persons for any offences against a law of the Commonwealth or of a Territory;
- (eaa) decisions under the *Law Enforcement Integrity Commissioner Act 2006* being:
  - (i) decisions in connection with a corruption investigation (within the meaning of that Act); or
  - (ii) decisions in connection with a public inquiry (within the meaning of that Act);
- (ea) decisions under the *Australian Crime Commission Act 2002* being:
  - (i) decisions in connection with intelligence operations; or
  - (ii) decisions in connection with investigations of State offences that have a federal aspect;
- (f) decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to, or may result in, the bringing of such proceedings for the recovery of pecuniary penalties arising from contraventions of enactments, and, in particular:
  - (i) decisions in connection with the investigation of persons for such contraventions;
  - (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
  - (iii) decisions in connection with the issue of search warrants or seizure warrants issued under Division 1 of Part XII of the *Customs Act 1901* under enactments; and
  - (iv) decisions under enactments requiring the production of documents, the giving of information or the summoning of persons as witnesses;
- (g) decisions of the Finance Minister to issue sums out of the Consolidated Revenue Fund under an Act to appropriate moneys out of that Fund for the service of, or for expenditure in respect of, any year;
- (h) decisions under section 27 of the *Financial Management and Accountability Act 1997*;
- (i) decisions of the Commonwealth Grants Commission relating to the allocation of funds;
- (j) decisions of any of the following Tribunals:
  - Academic Salaries Tribunal
  - Defence Force Remuneration Tribunal
  - Federal Police Arbitral Tribunal
  - Remuneration Tribunal;
- (k) decisions of any of the following authorities in respect of their commercial activities:
  - Australian Honey Board
  - Australian Meat and Live-stock Corporation
  - Australian Wheat Board
  - Australian Wool Corporation
  - Canberra Commercial Development Authority
  - Christmas Island Phosphate Commission
  - Indigenous Business Australia;



## Appendix I: ADJR Act Schedule 2

- (l) decisions of the Reserve Bank in connection with its banking operations (including individual open market operations and foreign exchange dealings);
- (m) decisions in connection with the enforcement of judgments or orders for the recovery of moneys by the Commonwealth or by an officer of the Commonwealth;
- (o) decisions of the National Director of the Commonwealth Employment Service made on behalf of that Service to refer, or not to refer, particular clients to particular employers;
- (p) decisions under the *Civil Aviation Act 1988* that:
  - (i) relate to aircraft design, the construction or maintenance of aircraft or the safe operation of aircraft or otherwise relate to aviation safety; and
  - (ii) arise out of findings on material questions of fact based on evidence, or other material:
    - (A) that was supplied in confidence; or
    - (B) the publication of which would reveal information that is a trade secret;
- (q) decisions in connection with personnel management (including recruitment, training, promotion and organization) with respect to the Australian Public Service or any other Service established by an enactment or the staff of a Commonwealth authority, other than a decision relating to, and having regard to the particular characteristics of, or other circumstances relating to, a particular person;
- (r) decisions relating to assignment of duties, voluntary moves between Agencies, compulsory moves between Agencies, promotions or decisions of Promotion Review Committees, of or by individual APS employees;
- (t) decisions relating to:
  - (i) the making of appointments in the Australian Public Service or any other Service established by an enactment or to the staff of a Commonwealth authority;
  - (ii) the engagement of persons as employees under the *Public Service Act 1999* or under any other enactment that establishes a Service or by a Commonwealth authority; or
  - (iii) the making of appointments under an enactment or to an office established by, or under, an enactment;
- (u) decisions in connection with industrial matters, in respect of the Australian Public Service or any other Service established by an enactment or the staff of a Commonwealth authority;
- (w) decisions relating to the making or terminating of appointments of Secretaries under the *Public Service Act 1999*;
- (y) decisions relating to:
  - (i) engaging, or terminating engagements of, consultants; or
  - (ii) employing, or terminating the employment of, staff;under the *Members of Parliament (Staff) Act 1984*;
- (z) decisions under section 28, 40F or 40H of the *Australian Federal Police Act 1979*;
- (zb) decisions relating to the activities of the Export Finance and Insurance Corporation under Part 4 or 5 of the *Export Finance and Insurance Corporation Act 1991*;
- (zc) decisions of the Minister for Foreign Affairs under Part 8B of the *Broadcasting Services Act 1992* (for this purpose, **Minister for Foreign Affairs** has the same meaning as in that Act).

# APPENDIX J: *MIGRATION ACT* PART 8

## Part 8—Judicial review

### Division 1—Privative clause

#### 474 Decisions under Act are final

- (1) A privative clause decision:
  - (a) is final and conclusive; and
  - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
  - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

- (2) In this section:

***privative clause decision*** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

- (3) A reference in this section to a decision includes a reference to the following:
  - (a) granting, making, varying, suspending, cancelling, revoking or refusing to make an order or determination;
  - (b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);
  - (c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;
  - (d) imposing, or refusing to remove, a condition or restriction;
  - (e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;
  - (f) retaining, or refusing to deliver up, an article;
  - (g) doing or refusing to do any other act or thing;
  - (h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;
  - (i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;
  - (j) a failure or refusal to make a decision.
- (4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision:

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<b>Decisions that are not privative clause decisions</b>		
<b>Item</b>	<b>Provision</b>	<b>Subject matter of provision</b>
1	section 213	Liability for the costs of removal or deportation
2	section 217	Conveyance of removees
3	section 218	Conveyance of deportees etc.
4	section 222	Orders restraining non-citizens from disposing of property
5	section 223	Valuables of detained non-citizens
6	section 224	Dealing with seized valuables
7	section 252	Searches of persons
8	section 259	Detention of vessels for search
9	section 260	Detention of vessels/dealing with detained vessels
10	section 261	Disposal of certain vessels
11	Division 14 of Part 2	Recovery of costs
12	section 269	Taking of securities
13	section 272	Migrant centres
14	section 273	Detention centres
15	Part 3	Migration agents registration scheme
16	Part 4	Court orders about reparation
17	section 353A	Directions by Principal Member
18	section 354	Constitution of Migration Review Tribunal
19	section 355	Reconstitution of Migration Review Tribunal
20	section 355A	Reconstitution of Migration Review Tribunal for efficient conduct of review
21	section 356	Exercise of powers of Migration Review Tribunal
22	section 357	Presiding member
23	Division 7 of Part 5	Offences
24	Part 6	Establishment and membership of Migration Review Tribunal
25	section 421	Constitution of Refugee Review Tribunal
26	section 422	Reconstitution of Refugee Review Tribunal

<b>Decisions that are not privative clause decisions</b>		
<b>Item</b>	<b>Provision</b>	<b>Subject matter of provision</b>
27	section 422A	Reconstitution of Refugee Review Tribunal for efficient conduct of review
28	Division 6 of Part 7	Offences
29	Division 9 of Part 7	Establishment and membership of Refugee Review Tribunal
30	Division 10 of Part 7	Registry and officers
31	regulation 5.35	Medical treatment of persons in detention

- (5) The regulations may specify that a decision, or a decision included in a class of decisions, under this Act, or under regulations or another instrument under this Act, is not a privative clause decision.
- (6) A decision mentioned in subsection 474(4), or specified (whether by reference to a particular decision or a class of decisions) in regulations made under subsection 474(5), is a ***non-privative clause decision***.
- (7) To avoid doubt, the following decisions are ***privative clause decisions*** within the meaning of subsection 474(2):
  - (a) a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under subsection 37A(2) or (3), section 48B, paragraph 72(1)(c), section 91F, 91L, 91Q, 195A, 197AB, 197AD, 351, 391, 417 or 454 or subsection 503A(3);
  - (b) a decision of the Principal Member of the Migration Review Tribunal or of the Principal Member of the Refugee Review Tribunal to refer a matter to the Administrative Appeals Tribunal;
  - (c) a decision of the President of the Administrative Appeals Tribunal to accept, or not to accept, the referral of a decision under section 382 or 444;
  - (d) a decision of the Minister under Division 13A of Part 2 to order that a thing is not to be condemned as forfeited.

## **Division 2—Jurisdiction and procedure of courts**

### **475 This Division not to limit section 474**

This Division is not to be taken to limit the scope or operation of section 474.

### **476 Jurisdiction of the Federal Magistrates Court**

- (1) Subject to this section, the Federal Magistrates Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution.
- (2) The Federal Magistrates Court has no jurisdiction in relation to the following decisions:

## Appendix J: Migration Act Part 8

- (a) a primary decision;
  - (b) a privative clause decision, or purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500;
  - (c) a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C;
  - (d) a privative clause decision or purported privative clause decision mentioned in subsection 474(7).
- (3) Nothing in this section affects any jurisdiction the Federal Magistrates Court may have in relation to non-privative clause decisions under section 8 of the *Administrative Decisions (Judicial Review) Act 1977* or section 44AA of the *Administrative Appeals Tribunal Act 1975*.
- (4) In this section:

**primary decision** means a privative clause decision or purported privative clause decision:

- (a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or
- (b) that would have been so reviewable if an application for such review had been made within a specified period.

### 476A Limited jurisdiction of the Federal Court

- (1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:
- (a) the Federal Magistrates Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Magistrates Act 1999*; or
  - (b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or
  - (c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C; or
  - (d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.

Note: Only non-privative clause decisions can be taken to the Federal Court under subsection 44(3) of the *Administrative Appeals Tribunal Act 1975* (see section 483).

- (2) Where the Federal Court has jurisdiction in relation to a migration decision under paragraph (1)(a), (b) or (c), that jurisdiction is the same as the jurisdiction of the High Court under paragraph 75(v) of the Constitution.
- (3) Despite section 24 of the *Federal Court of Australia Act 1976*, an appeal may not be brought to the Federal Court from:
- (a) a judgment of the Federal Magistrates Court that makes an order or refuses to make an order under subsection 477(2); or
  - (b) a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2).

- (4) Despite section 33 of the *Federal Court of Australia Act 1976*, an appeal may not be brought to the High Court from a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2).

- (5) In this section:

*judgment* has the same meaning as in the *Federal Court of Australia Act 1976*.

#### **476B Remittal by the High Court**

- (1) Subject to subsection (3), the High Court must not remit a matter, or any part of a matter, that relates to a migration decision to any court other than the Federal Magistrates Court.
- (2) The High Court must not remit a matter, or any part of a matter, that relates to a migration decision to the Federal Magistrates Court unless that court has jurisdiction in relation to the matter, or that part of the matter, under section 476.
- (3) The High Court may remit a matter, or part of a matter, that relates to a migration decision in relation to which the Federal Court has jurisdiction under paragraph 476A(1)(b) or (c) to that court.
- (4) Subsection (1) has effect despite section 44 of the *Judiciary Act 1903*.

#### **477 Time limits on applications to the Federal Magistrates Court**

- (1) An application to the Federal Magistrates Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.
- (2) The Federal Magistrates Court may, by order, extend that 35 day period as the Federal Magistrates Court considers appropriate if:
- (a) an application for that order has been made in writing to the Federal Magistrates Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and
  - (b) the Federal Magistrates Court is satisfied that it is necessary in the interests of the administration of justice to make the order.
- (3) In this section:

*date of the migration decision* means:

- (a) in the case of a migration decision made under subsection 43(1) of the *Administrative Appeals Tribunal Act 1975*—the date of the written decision under that subsection; or
- (b) in the case of a written migration decision made by the Migration Review Tribunal or the Refugee Review Tribunal—the date of the written statement under subsection 368(1) or 430(1); or
- (c) in the case of an oral migration decision made by the Migration Review Tribunal or the Refugee Review Tribunal—the date of the oral decision; or
- (d) in any other case—the date of the written notice of the decision or, if no such notice exists, the date that the Court considers appropriate.

## *Appendix J: Migration Act Part 8*

- (4) For the purposes of subsection (1), the 35 day period begins to run despite a failure to comply with the requirements of any of the provisions mentioned in the definition of ***date of the migration decision*** in subsection (3).
- (5) To avoid doubt, for the purposes of subsection (1), the 35 day period begins to run irrespective of the validity of the migration decision.

### **477A Time limits on applications to the Federal Court**

- (1) An application to the Federal Court for a remedy to be granted in exercise of the court's original jurisdiction under paragraph 476A(1)(b) or (c) in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.
- (2) The Federal Court may, by order, extend that 35 day period as the Federal Court considers appropriate if:
  - (a) an application for that order has been made in writing to the Federal Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and
  - (b) the Federal Court is satisfied that it is necessary in the interests of the administration of justice to make the order.
- (3) In this section:  
***date of the migration decision*** has the meaning given by subsection 477(3).
- (4) For the purposes of subsection (1), the 35 day period begins to run despite a failure to comply with the requirements of any of the provisions mentioned in the definition of ***date of the migration decision*** in subsection 477(3).
- (5) To avoid doubt, for the purposes of subsection (1), the 35 day period begins to run irrespective of the validity of the migration decision.

### **478 Persons who may make application**

An application referred to in section 477 or 477A may only be made by the Minister, or where appropriate the Secretary, and:

- (a) if the migration decision concerned is made on review under Part 5 or 7 or section 500—the applicant in the review by the relevant Tribunal; or
- (b) in any other case—the person who is the subject of the decision; or
- (c) in any case—a person prescribed by the regulations.

### **479 Parties to review**

The parties to a review of a migration decision resulting from an application referred to in section 477 or 477A are the Minister, or where appropriate the Secretary, and:

- (a) if the migration decision concerned is made on review under Part 5 or 7 or section 500—the applicant in the review by the relevant Tribunal; or
- (b) in any other case—the person who is the subject of the migration decision; or
- (c) in any case—a person prescribed by the regulations.



**480 Intervention by Attorney-General**

- (1) The Attorney-General may, on behalf of the Commonwealth, intervene in a proceeding resulting from an application referred to in section 477 or 477A.
- (2) If the Attorney-General intervenes in such a proceeding, the Federal Magistrates Court or Federal Court (as the case requires) may make such orders as to costs against the Commonwealth as the court thinks fit.
- (3) If the Attorney-General intervenes in such a proceeding, he or she is taken to be a party to the proceeding.

**481 Operation etc. of decision**

The making of an application referred to in section 477 or 477A does not:

- (a) affect the operation of the decision; or
- (b) prevent the taking of action to implement the decision; or
- (c) prevent the taking of action in reliance on the making of the decision.

**482 Changing person holding, or performing the duties of, an office**

If:

- (a) a person has, in the performance of the duties of an office, made a migration decision; and
- (b) the person no longer holds, or, for whatever reason, is not performing the duties of, that office;

this Part has effect as if the decision had been made by:

- (c) the person for the time being holding or performing the duties of that office; or
- (d) if there is no person for the time being holding or performing the duties of that office or that office no longer exists—such person as the Minister specifies.

**483 Section 44 of the *Administrative Appeals Tribunal Act 1975***

Section 44 of the *Administrative Appeals Tribunal Act 1975* does not apply to privative clause decisions or purported privative clause decisions.

**484 Exclusive jurisdiction of High Court, Federal Court and Federal Magistrates Court**

- (1) Only the High Court, the Federal Court and the Federal Magistrates Court have jurisdiction in relation to migration decisions.
- (2) To avoid doubt, subsection (1) is not intended to confer jurisdiction on the High Court, the Federal Court or the Federal Magistrates Court, but to exclude other courts from jurisdiction in relation to migration decisions.
- (3) To avoid doubt, despite section 67C of the *Judiciary Act 1903*, the Supreme Court of the Northern Territory does not have jurisdiction in relation to migration decisions.
- (4) To avoid doubt, jurisdiction in relation to migration decisions is not conferred on any court under the *Jurisdiction of Courts (Cross-vesting) Act 1987*.

# APPENDIX K: *AAT ACTS* 44

## 44 Appeals to Federal Court of Australia from decisions of the Tribunal

### *Appeal on question of law*

- (1) A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

### *Appeal about standing*

- (2) Where a person has applied to the Tribunal for a review of a decision, or has applied to be made a party to a proceeding before the Tribunal for a review of a decision, and the Tribunal decides that the interests of the person are not affected by the decision, the person may appeal to the Federal Court of Australia from the decision of the Tribunal.

### *When and how appeal instituted*

- (2A) An appeal by a person under subsection (1) or (2) shall be instituted:
  - (a) not later than the twenty-eighth day after the day on which a document setting out the terms of the decision of the Tribunal is given to the person or within such further time as the Federal Court of Australia (whether before or after the expiration of that day) allows; and
  - (b) in such manner as is prescribed by rules of court made under the *Federal Court of Australia Act 1976*.
- (2B) In the interest of justice, the grounds on which the Federal Court of Australia may allow further time under paragraph (2A)(a) include, but are not limited to, the following grounds:
  - (a) if the Tribunal made an oral statement as to the reasons for the decision and afterwards gave a written statement of reasons for the decision—the written statement contains reasons that were not mentioned in the oral statement;
  - (b) the text of the decision or a statement of reasons for the decision has been altered under section 43AA.

### *Jurisdiction*

- (3) The Federal Court of Australia has jurisdiction to hear and determine appeals instituted in that Court in accordance with subsections (1) and (2) and that jurisdiction:
  - (a) may be exercised by that Court constituted as a Full Court;
  - (b) shall be so exercised if:
    - (i) the Tribunal's decision was given by the Tribunal constituted by a member who was, or by members at least one of whom was, a presidential member; and
    - (ii) after consulting the President, the Chief Justice of that Court considers that it is appropriate for the appeal from the decision to be heard and determined by that Court constituted as a Full Court; and
  - (c) shall be so exercised if the Tribunal's decision was given by the Tribunal constituted by a member who was, or by members at least one of whom was, a Judge.

## *Federal Judicial Review in Australia*

### *Powers of Federal Court*

- (4) The Federal Court of Australia shall hear and determine the appeal and may make such order as it thinks appropriate by reason of its decision.
- (5) Without limiting by implication the generality of subsection (4), the orders that may be made by the Federal Court of Australia on an appeal include an order affirming or setting aside the decision of the Tribunal and an order remitting the case to be heard and decided again, either with or without the hearing of further evidence, by the Tribunal in accordance with the directions of the Court.

### *Constitution of Tribunal if Federal Court remits case etc.*

- (6) If the Federal Court of Australia makes an order remitting a case to be heard and decided again by the Tribunal:
  - (a) the Tribunal need not be constituted for the hearing by the person or persons who made the decision to which the appeal relates; and
  - (b) whether or not the Tribunal is reconstituted for the hearing—the Tribunal may, for the purposes of the proceeding, have regard to any record of the proceeding before the Tribunal prior to the appeal (including a record of any evidence taken in the proceeding), so long as doing so is not inconsistent with the directions of the Court.

### *Federal Court may make findings of fact*

- (7) If a party to a proceeding before the Tribunal appeals to the Federal Court of Australia under subsection (1), the Court may make findings of fact if:
  - (a) the findings of fact are not inconsistent with findings of fact made by the Tribunal (other than findings made by the Tribunal as the result of an error of law); and
  - (b) it appears to the Court that it is convenient for the Court to make the findings of fact, having regard to:
    - (i) the extent (if any) to which it is necessary for facts to be found; and
    - (ii) the means by which those facts might be established; and
    - (iii) the expeditious and efficient resolution of the whole of the matter to which the proceeding before the Tribunal relates; and
    - (iv) the relative expense to the parties of the Court, rather than the Tribunal, making the findings of fact; and
    - (v) the relative delay to the parties of the Court, rather than the Tribunal, making the findings of fact; and
    - (vi) whether any of the parties considers that it is appropriate for the Court, rather than the Tribunal, to make the findings of fact; and
    - (vii) such other matters (if any) as the Court considers relevant.
- (8) For the purposes of making findings of fact under subsection (7), the Federal Court of Australia may:
  - (a) have regard to the evidence given in the proceeding before the Tribunal; and
  - (b) receive further evidence.
- (9) Subsection (7) does not limit the Federal Court of Australia's power under subsection (5) to make an order remitting the case to be heard and decided again by the Tribunal.
- (10) The jurisdiction of the Federal Court of Australia under subsection (3) includes jurisdiction to make findings of fact under subsection (7).

# APPENDIX L: *TAXATION*

## *ADMINISTRATION ACT* PART IVC

### Part IVC—Taxation objections, reviews and appeals

#### Division 1—Introduction

##### 14ZL Part applies to taxation objections

- (1) This Part applies if a provision of an Act or of regulations (including the provision as applied by another Act) provides that a person who is dissatisfied with an assessment, determination, notice or decision, or with a failure to make a private ruling, may object against it in the manner set out in this Part.
- (2) Such an objection is in this Part called a *taxation objection*.

##### 14ZM Division 2—Interpretive

Division 2 contains interpretive provisions necessary for this Part.

##### 14ZN Division 3—Taxation objections

Division 3 describes how taxation objections are to be made and how they are to be dealt with by the Commissioner.

##### 14ZO Division 4—Tribunal review

Division 4 contains provisions about applications to the Tribunal for review of decisions by the Commissioner in relation to certain taxation objections and requests for extension of time.

##### 14ZP Division 5—Federal Court appeals

Division 5 contains provisions about appeals to the Federal Court against decisions by the Commissioner in relation to certain taxation objections.

#### Division 2—Interpretive provisions

##### 14ZQ General interpretation provisions

In this Part:

*AAT* means the Administrative Appeals Tribunal.

*AAT Act* means the *Administrative Appeals Tribunal Act 1975*.

*AAT extension application* means an application under subsection 29(7) of the AAT Act that relates to a review of a reviewable objection decision or an extension of time refusal decision.

*delayed administration (beneficiary) objection* means a taxation objection made under:

## *Federal Judicial Review in Australia*

- (b) subsection 220(3) of the *Income Tax Assessment Act 1936* (including that subsection as applied by any other Act); or
- (g) subsection 260-145(5) in Schedule 1 (because of paragraph (a) of that subsection).

***delayed administration (trustee) objection*** means a taxation objection made under:

- (a) subsection 220(7) of the *Income Tax Assessment Act 1936* (including that subsection as applied by any other Act); or
- (b) subsection 260-145(5) in Schedule 1 (because of paragraph (b) of that subsection).

***extension of time refusal decision*** means a decision of the Commissioner under subsection 14ZX(1) to refuse a request by a person.

***Family Court*** means the Family Court of Australia.

***Family Court Judge*** means a Judge of the Family Court (including the Chief Judge, the Deputy Chief Judge, a Judge Administrator or a Senior Judge).

***Federal Court*** means the Federal Court of Australia.

***franking assessment*** has the same meaning as in the *Income Tax Assessment Act 1997*.

***objection decision*** has the meaning given by subsection 14ZY(2).

***reviewable objection decision*** means an objection decision that is not an ineligible income tax remission decision.

***taxation decision*** means the assessment, determination, notice or decision against which a taxation objection may be, or has been, made.

***taxation objection*** has the meaning given by section 14ZL.

### **14ZR Taxation decisions covered by single notice to be treated as single decision**

- (1) If:
  - (a) a provision of an Act (including a provision as applied by another Act) provides that a person who is dissatisfied with a taxation decision may object against it in the manner set out in this Part; and
  - (b) a notice incorporates notice of 2 or more such taxation decisions;then, for the purposes of the provision and of this Part, the taxation decisions are taken to be one taxation decision.
- (2) If:
  - (a) under subsection (1), 2 or more taxation decisions are taken to be a single taxation decision (in this subsection called the ***deemed single taxation decision***); and
  - (b) the Commissioner makes an objection decision in relation to the deemed single taxation decision; and
  - (c) the objection decision is to any extent an ineligible income tax remission decision;

## Appendix L: Taxation Administration Act Part IVC

then, this Part has effect, in relation to any review or appeal, as if so much of the objection decision as consists of one or more ineligible income tax remission decisions were taken to be a separate objection decision.

### 14ZS Ineligible income tax remission decisions

- (1) An objection decision is an ***ineligible income tax remission decision*** if it relates to the remission of additional tax payable by a taxpayer under the *Income Tax Assessment Act 1936* (other than Division 11 of former Part IIIAA), except where the additional tax is payable under former section 163B, 224, 225, 226, 226G, 226H, 226J, 226K, 226L or 226M of that Act, whatever its amount, or is payable under a provision of former Part VII of that Act other than any of the preceding sections and its amount, after the decision is made, exceeds:
  - (a) in the case of additional tax payable under former section 222 of that Act because of the refusal or failure to furnish a return, or any information, relating to a year of income—the amount calculated, in respect of the period commencing on the last day allowed for furnishing the return or information and ending on:
    - (i) the day on which the return or information is furnished; or
    - (ii) the day on which the assessment of the additional tax is made;whichever first happens, at the rate of 20% per year of the tax properly payable by the taxpayer in respect of the year of income; or
  - (d) if the amount calculated in accordance with paragraph (a) is less than \$20—\$20.
- (2) A reference in this section to a provision of the *Income Tax Assessment Act 1936* includes a reference to that provision as applied by any other Act.

### Division 3—Taxation objections

#### 14ZU How taxation objections are to be made

A person making a taxation objection must:

- (a) make it in the approved form; and
- (b) lodge it with the Commissioner within the period set out in section 14ZW; and
- (c) state in it, fully and in detail, the grounds that the person relies on.

Note: A person who objects against the Commissioner's failure to make a private ruling must lodge a draft private ruling with the objection: see subsection 359-50(4).

#### 14ZV Limited objection rights in the case of certain amended taxation decisions

If the taxation objection is made against a taxation decision, being an assessment or determination that has been amended in any particular, then a person's right to object against the amended assessment or amended determination is limited to a right to object against alterations or additions in respect of, or matters relating to, that particular.

#### 14ZVA Limited objection rights because of objection against private ruling

If there has been a taxation objection against a private ruling, then the right of objection under this Part against an assessment, or against a decision made under an

indirect tax law or an excise law, relating to the matter ruled is limited to a right to object on grounds that neither were, nor could have been, grounds for the taxation objection against the ruling.

**14ZW When taxation objections are to be made**

- (1) Subject to this section, the person must lodge the taxation objection with the Commissioner within:
  - (aa) if the taxation objection is made under section 175A of the *Income Tax Assessment Act 1936*:
    - (i) if item 1, 2 or 3 of the table in subsection 170(1) of that Act applies to the assessment concerned—2 years after notice of the assessment is given to the person; or
    - (ii) otherwise—4 years after notice of the assessment concerned is given to the person; or
  - (aaa) if the taxation objection is made under section 78A of the *Fringe Benefits Tax Assessment Act 1986* or former section 160AL of the *Income Tax Assessment Act 1936*—4 years after notice of the taxation decision to which it relates has been given to the person; or
  - (aab) if the taxation objection is made under section 292-245 of the *Income Tax Assessment Act 1997*—4 years after notice of the assessment concerned is given to the person; or
  - (ab) if the taxation objection is a delayed administration (beneficiary) objection made under subsection 260-145(5) in Schedule 1 (because of paragraph (a) of that subsection) or subsection 220(3) of the *Income Tax Assessment Act 1936* (not including that subsection as applied by any other Act)—4 years after notice of the taxation decision to which it relates has been first published; or
  - (ac) if the taxation objection is a delayed administration (trustee) objection made under subsection 260-145(5) in Schedule 1 (because of paragraph (b) of that subsection) or subsection 220(7) of the *Income Tax Assessment Act 1936* (not including that subsection as applied by any other Act)—4 years after probate of the will, or letters of administration of the estate, of the deceased person concerned has been granted; or
    - (a) if the taxation objection is a delayed administration (beneficiary) objection to which paragraph (ab) does not apply—60 days after notice of the taxation decision to which it relates has been first published; or
    - (b) if the taxation objection is a delayed administration (trustee) objection to which paragraph (ac) does not apply—60 days after probate of the will, or letters of administration of the estate, of the deceased person concerned has been granted; or
  - (ba) if the taxation objection is an objection under subsection 359-50(3) in Schedule 1 against the Commissioner's failure to make a private ruling—60 days after the end of the period of 30 days referred to in that subsection; or
  - (bb) if the taxation objection is made under section 66 of the *Petroleum Resource Rent Tax Assessment Act 1987* to an assessment under that Act—4 years after notice of the assessment is given to the person; or
  - (bd) if the taxation objection is made under section 20P of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* against a notice given to a superannuation provider under section 20C of that Act and the person is not



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- the superannuation provider—2 years after the notice was given to the superannuation provider; or
- (be) if the taxation objection is made under section 20P of the *Superannuation (Unclaimed Money and Lost Members) Act 1999* against a decision under Division 4 or 5 of Part 3A of that Act and the person is not a superannuation provider (as defined in that Act)—2 years after the person was given notice of the decision; or
- (c) in any other case—60 days after notice of the taxation decision to which it relates has been served on the person.
- (1AAA) The person must lodge the taxation objection against a reviewable indirect tax decision (within the meaning of section 105-40 in Schedule 1) before the end of whichever of the following ends last:
- (a) the 60 days after notice of the decision was served on the person;
- (b) the 4 years after the end of the tax period, or after the importation of goods, to which the decision relates.
- (1AAB) The person cannot lodge a taxation objection against a private indirect tax ruling after the end of whichever of the following ends last:
- (a) 60 days after the ruling was made;
- (b) 4 years after the end of the tax period, or after the importation of goods, to which the ruling relates.
- (1A) The person cannot lodge a taxation objection against a private ruling (other than a private indirect tax ruling, or a ruling that relates to an excise law) that relates to a year of income after the end of whichever of the following ends last:
- (a) 60 days after the ruling was made;
- (b) whichever of the following is applicable:
- (i) if item 1, 2 or 3 of the table in subsection 170(1) of the *Income Tax Assessment Act 1936* applies to the person's assessment for that income year—2 years after the last day allowed to the person for lodging a return in relation to the person's income for that year of income;
- (ii) otherwise—4 years after that day.
- (1AA) The person cannot lodge a taxation objection against a private ruling that relates to a year of tax and a petroleum project under the *Petroleum Resource Rent Tax Assessment Act 1987* after the end of whichever of the following ends last:
- (a) the 60 days after the ruling was made;
- (b) the 4 years after the last day allowed to the person for lodging a return in relation to the year of tax and the project.
- (1B) If:
- (a) section 14ZV applies to a taxation objection; and
- (b) apart from this subsection, subparagraph (1)(aa)(ii) or paragraph (1)(aaa), (aab), (ab), (ac) or (bb) would apply to the taxation objection;
- the person must lodge the taxation objection before the end of whichever of the following ends last:
- (c) the 4 years after notice of the assessment or determination that has been amended by the amended assessment or amended determination to which the taxation objection relates has been served on the person;

- (d) the 60 days after the notice of the amended assessment or amended determination to which the taxation objection relates has been served on the person.

(1BA) If:

- (a) section 14ZV applies to a taxation objection; and
- (b) apart from this subsection, subparagraph (1)(aa)(i) would apply to the taxation objection;

the person must lodge the taxation objection before the end of whichever of the following ends last:

- (c) 2 years after notice of the assessment or determination that has been amended by the amended assessment or amended determination to which the taxation objection relates has been served on the person;
- (d) 60 days after the notice of the amended assessment to which the taxation objection relates has been served on the person.

(1BB) If:

- (a) the taxation objection is against an assessment by the Commissioner of the amount of an administrative penalty under Division 284; and
- (b) that penalty relates to an assessment of the person; and
- (c) the person has longer than 60 days to lodge a taxation objection against the assessment referred to in paragraph (b);

the person must lodge the taxation objection within that longer period.

- (1C) For the purposes of paragraph (1B)(c), if an assessment or determination has been amended more than once, the notice is the notice of the first assessment or determination in relation to the year of income, franking year or year of tax, as the case requires.
- (2) If the period within which an objection by a person is required to be lodged has passed, the person may nevertheless lodge the objection with the Commissioner together with a written request asking the Commissioner to deal with the objection as if it had been lodged within that period.
- (3) The request must state fully and in detail the circumstances concerning, and the reasons for, the person's failure to lodge the objection with the Commissioner within the required period.

#### **14ZX Commissioner to consider applications for extension of time**

- (1) After considering the request, the Commissioner must decide whether to agree to it or refuse it.
- (2) The Commissioner must give the person written notice of the Commissioner's decision.
- (3) If the Commissioner decides to agree to the request, then, for the purposes of this Part, the objection is taken to have been lodged with the Commissioner within the required period.
- (4) If the Commissioner decides to refuse the request, the person may apply to the Tribunal for review of the decision.

**14ZY Commissioner to decide taxation objections**

- (1) Subject to subsection (1A), if the taxation objection has been lodged with the Commissioner within the required period, the Commissioner must decide whether to:
  - (a) allow it, wholly or in part; or
  - (b) disallow it.
- (1A) If the taxation objection is an objection under subsection 359-50(3) in Schedule 1 against the Commissioner's failure to make a private ruling, the Commissioner must:
  - (a) make a private ruling in the same terms as the draft ruling lodged with the objection; or
  - (b) make a different private ruling.
- (2) Such a decision is in this Part called an *objection decision*.
- (3) The Commissioner must cause to be served on the person written notice of the Commissioner's objection decision.

**14ZYA Person may require Commissioner to make an objection decision**

- (1) This section applies if the taxation objection (other than one under subsection 359-50(3) in Schedule 1) has been lodged with the Commissioner within the required period and the Commissioner has not made an objection decision by whichever is the later of the following times:
  - (a) the end of the period (in this section called the *original 60-day period*) of 60 days after whichever is the later of the following days:
    - (i) the day on which the taxation objection is lodged with the Commissioner;
    - (ii) if the Commissioner decides under section 14ZX to agree to a request in relation to the taxation objection—the day on which the decision is made;
  - (b) if the Commissioner, by written notice served on the person within the original 60-day period, requires the person to give information relating to the taxation objection—the end of the period of 60 days after the Commissioner receives that information.
- (2) The person may give the Commissioner a written notice requiring the Commissioner to make an objection decision.
- (3) If the Commissioner has not made an objection decision by the end of the period of 60 days after being given the notice, then, at the end of that period, the Commissioner is taken to have made a decision under subsection 14ZY(1) to disallow the taxation objection.

**14ZYP Requiring Commissioner to make a private ruling**

- (1) This section applies if the taxation objection is an objection under subsection 359-50(3) in Schedule 1 against the Commissioner's failure to make a private ruling and the Commissioner has not made an objection decision by the end of 60 days after the later of these days:
  - (a) the day on which the taxation objection was lodged with the Commissioner;
  - (b) if the Commissioner decides under section 14ZX to agree to a request in relation to the taxation objection—the day on which the decision was made.

- (2) The Commissioner is taken, at the end of that 60 day period, to have disallowed the objection.

#### **14ZZ Person may seek review of, or appeal against, Commissioner's decision**

If the person is dissatisfied with the Commissioner's objection decision (including a decision under paragraph 14ZY(1A)(b) to make a different private ruling), the person may:

- (a) if the decision is a reviewable objection decision—either:
  - (i) apply to the Tribunal for review of the decision; or
  - (ii) appeal to the Federal Court against the decision; or
- (b) otherwise—appeal to the Federal Court against the decision.

### **Division 4—AAT review of objection decisions and extension of time refusal decisions**

#### **14ZZA Modified AAT Act to apply**

The AAT Act applies in relation to:

- (a) the review of reviewable objection decisions; and
- (b) the review of extension of time refusal decisions; and
- (c) AAT extension applications;

subject to the modifications set out in this Division.

#### **14ZZB Sections 27, 28, 41 and 44A of the AAT Act not to apply to certain decisions**

- (1) Sections 27 and 41 of the AAT Act do not apply in relation to:
  - (a) a reviewable objection decision; or
  - (b) an extension of time refusal decision.
- (2) Sections 28 and 44A of the AAT Act do not apply in relation to a reviewable objection decision.

#### **14ZZC Modification of section 29 of the AAT Act**

Section 29 of the AAT Act applies in relation to a reviewable objection decision as if subsections (1) to (6) (inclusive) of that section were omitted and the following subsection were substituted:

- “(1) An application to the Tribunal for a review of a decision:
- (a) must be in writing; and
  - (b) may be made in accordance with the prescribed form; and
  - (c) must set out a statement of the reasons for the application; and
  - (d) must be lodged with the Tribunal within 60 days after the person making the application is served with notice of the decision.”.

#### **14ZZD Modification of section 30 of the AAT Act**

Section 30 of the AAT Act applies in relation to a reviewable objection decision or an extension of time refusal decision as if subsection (1A) of that section were omitted and the following subsection were substituted:

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- “(1A) If an application has been made by a person to the Tribunal for the review of a reviewable objection decision or an extension of time refusal decision:
- (a) any other person whose interests are affected by the decision may apply, in writing, to the Tribunal to be made a party to the proceeding; and
  - (b) the Tribunal may, in its discretion, by order, if it is satisfied that the person making the application consents to the order, make that person a party to the proceeding.”.

### **14ZZE Hearings before Tribunal other than Small Taxation Claims Tribunal to be held in private if applicant so requests**

Despite section 35 of the AAT Act, the hearing of a proceeding before the Tribunal, other than the Small Taxation Claims Tribunal, for:

- (a) a review of a reviewable objection decision; or
- (b) a review of an extension of time refusal decision; or
- (c) an AAT extension application;

is to be in private if the party who made the application requests that it be in private.

### **14ZZF Modification of section 37 of the AAT Act**

- (1) Section 37 of the AAT Act applies in relation to an application for review of a reviewable objection decision as if:
  - (a) the requirement in subsection (1) of that section to lodge with the Tribunal such numbers of copies as is prescribed of statements or other documents were instead a requirement to lodge with the Tribunal such numbers of copies as is prescribed of:
    - (i) a statement giving the reasons for the decision; and
    - (ii) the notice of the taxation decision concerned; and
    - (iii) the taxation objection concerned; and
    - (iv) the notice of the objection decision; and
    - (v) every other document that is in the Commissioner’s possession or under the Commissioner’s control and is considered by the Commissioner to be necessary to the review of the objection decision concerned; and
    - (vi) a list of the documents (if any) being lodged under subparagraph (v); and
  - (b) the power of the Tribunal under subsection (2) of that section to cause a notice to be served containing a statement and imposing a requirement on a person were instead:
    - (i) a power to make such a statement and impose such a requirement orally at a conference held in accordance with subsection 34(1) of the AAT Act; and
    - (ii) a power, by such a notice, to make such a statement and impose a requirement that the person lodge with the Tribunal, within the time specified in the notice, the prescribed number of copies of each of those other documents that is in the person’s possession or under the person’s control; and
    - (iii) a power, by such a notice, to make such a statement and impose a requirement that the person lodge with the Tribunal, within the time specified in the notice, the prescribed number of copies of a list of the documents in the person’s possession or under the person’s control

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considered by the person to be relevant to the review of the objection decision concerned.

- (2) Paragraph (1)(b) does not affect any powers that the Tribunal has apart from that paragraph.
- (3) The imposition of a requirement covered by subparagraph (1)(b)(iii) does not prevent the subsequent imposition of a requirement covered by subparagraph (1)(b)(ii).

### **14ZZG Modification of section 38 of the AAT Act**

Section 38 of the AAT Act applies in relation to an application for a review of a reviewable objection decision as if the reference to paragraph 37(1)(a) of that Act were instead a reference to subparagraph 14ZZF(1)(a)(i) of this Act.

### **14ZZJ Modification of section 43 of the AAT Act**

Section 43 of the AAT Act applies in relation to:

- (a) a review of a reviewable objection decision; and
- (b) a review of an extension of time refusal decision; and
- (c) an AAT extension application;

as if the following subsections were inserted after subsection (2B):

“(2C) If a hearing of a proceeding for the review of a decision or an AAT extension application is not conducted in public, that fact does not prevent the Tribunal from publishing its reasons for the decision.

“(2D) If:

- (a) a hearing of a proceeding for the review of a decision or an AAT extension application is not conducted in public; and
- (b) a notice of appeal has not been lodged with the Federal Court;

the Tribunal must ensure, as far as practicable, that its reasons for the decision are framed so as not to be likely to enable the identification of the person who applied for the review.

“(2E) In subsections (2C) and (2D):

***reasons for decision*** includes findings on material questions of fact and references to the evidence or other material on which those findings were based.”.

### **14ZZK Grounds of objection and burden of proof**

On an application for review of a reviewable objection decision:

- (a) the applicant is, unless the Tribunal orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and
- (b) the applicant has the burden of proving that:
  - (i) if the taxation decision concerned is an assessment (other than a franking assessment)—the assessment is excessive; or
  - (ii) if the taxation decision concerned is a franking assessment—the assessment is incorrect; or

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- (iii) in any other case—the taxation decision concerned should not have been made or should have been made differently.

### **14ZZL Implementation of Tribunal decisions**

- (1) When the decision of the Tribunal on the review of a reviewable objection decision or an extension of time refusal decision becomes final, the Commissioner must, within 60 days, take such action, including amending any assessment or determination concerned, as is necessary to give effect to the decision.
- (2) For the purposes of subsection (1), if no appeal is lodged against the Tribunal's decision within the period for lodging an appeal, the decision becomes final at the end of the period.

### **14ZZM Pending review not to affect implementation of taxation decisions**

The fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending.

## **Division 5—Federal Court appeals against objection decisions**

### **14ZZN Time limit for appeals**

An appeal to the Federal Court against an objection decision must be lodged with the Court within 60 days after the person appealing is served with notice of the decision.

### **14ZZO Grounds of objection and burden of proof**

In proceedings on an appeal under section 14ZZ to the Federal Court against an objection decision:

- (a) the appellant is, unless the Court orders otherwise, limited to the grounds stated in the taxation objection to which the decision relates; and
- (b) the appellant has the burden of proving that:
  - (i) if the taxation decision concerned is an assessment (other than a franking assessment)—the assessment is excessive; or
  - (ii) if the taxation decision concerned is a franking assessment—the assessment is incorrect; or
  - (iii) in any other case—the taxation decision should not have been made or should have been made differently.

### **14ZZP Order of Federal Court on objection decision**

Where the Federal Court hears an appeal against an objection decision under section 14ZZ, the Court may make such order in relation to the decision as it thinks fit, including an order confirming or varying the decision.

### **14ZZQ Implementation of Federal Court order in respect of objection decision**

- (1) When the order of the Federal Court in relation to the decision becomes final, the Commissioner must, within 60 days, take such action, including amending any assessment or determination concerned, as is necessary to give effect to the decision.



- (2) For the purposes of subsection (1):
- (a) if the order is made by the Federal Court constituted by a single Judge and no appeal is lodged against the order within the period for lodging an appeal—the order becomes final at the end of the period; and
  - (b) if the order is made by the Full Court of the Federal Court and no application for special leave to appeal to the High Court against the order is made within the period of 30 days after the order is made—the order becomes final at the end of the period.

**14ZZR Pending appeal not to affect implementation of taxation decisions**

The fact that an appeal is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no appeal were pending.

**14ZZS Transfer of certain proceedings to Family Court**

- (1) If:
- (a) a proceeding is pending in the Federal Court on an appeal under section 14ZZ in relation to an objection decision; and
  - (b) the taxation decision to which the objection decision relates was made under the *Income Tax Assessment Act 1936*;
- the Federal Court may, on the application of a party to the proceeding or on its own initiative, transfer the proceeding to the Family Court.
- (2) Subject to subsection (3), if the proceeding is transferred to the Family Court:
- (a) the Family Court has jurisdiction to hear and determine the proceeding; and
  - (b) the Family Court also has jurisdiction to hear and determine matters not otherwise within its jurisdiction (whether because of paragraph (a) or otherwise):
    - (i) that are associated with matters arising in the proceeding; or
    - (ii) that, apart from subsection 32(1) of the *Federal Court of Australia Act 1976*, the Federal Court would have had jurisdiction to hear and determine in the proceeding; and
  - (c) the Family Court may, in and in relation to the proceeding:
    - (i) grant such remedies; and
    - (ii) make orders of such kinds; and
    - (iii) issue, and direct the issue of, writs of such kinds;as the Federal Court could have granted, made, issued or directed the issue of, as the case may be, in and in relation to the proceeding; and
  - (d) remedies, orders and writs granted, made or issued by the Family Court in and in relation to the proceeding have effect, and may be enforced by the Family Court, as if they had been granted, made or issued by the Federal Court; and
  - (e) appeals lie from judgments of the Family Court given in and in relation to the proceeding as if the judgments were judgments of the Federal Court constituted by a single Judge of that Court, and do not otherwise lie; and
  - (f) subject to paragraphs (a) to (e) (inclusive), this Act, the regulations, the *Federal Court of Australia Act 1976*, the Rules of the Court made under that Act, and other laws of the Commonwealth, apply in and in relation to the proceeding as if:

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- (i) a reference to the Federal Court (other than in the expression “the Court or a Judge”) included a reference to the Family Court; and
  - (ii) a reference to a Judge of the Federal Court (other than in the expression “the Court or a Judge”) included a reference to a Family Court Judge; and
  - (iii) a reference to the expression “the Court or a Judge” when used in relation to the Federal Court included a reference to a Family Court Judge sitting in Chambers; and
  - (iv) a reference to a Registrar of the Federal Court included a reference to a Registrar of the Family Court; and
  - (v) any other necessary changes were made.
- (3) If any difficulty arises in the application of paragraphs (2)(c), (d) and (f) in or in relation to a particular proceeding, the Family Court may, on the application of a party to the proceeding or on its own initiative, give such directions, and make such orders, as it considers appropriate to resolve the difficulty.
- (4) An appeal does not lie from a decision of the Federal Court in relation to the transfer of a proceeding under this Part to the Family Court.

# APPENDIX M: PUBLICATIONS OF THE ADMINISTRATIVE REVIEW COUNCIL

## REPORTS OF THE ADMINISTRATIVE REVIEW COUNCIL

1. *Administrative Decisions (Judicial Review) Act 1977* - Exclusions under Section 19, 1978
2. Repatriation Appeals, 1979
3. Review of Import Control and Customs By-Law Decisions, 1979
4. *Administrative Appeals Tribunal Act 1975* - Amendments, 1979
5. Defence Force Ombudsman, 1979
6. Entry to Cocos (Keeling) Islands and Christmas Island, 1979
7. Citizenship Review and Appeals System, 1980
8. Social Security Appeals, 1980
9. Administrative Decisions (Judicial Review) Amendment Bill 1980, 1980
10. Shipping Registration Bill, 1980
11. Student Assistance Review Tribunals, 1981
12. Australian Broadcasting Tribunal Procedures, 1981
13. Commonwealth Employees' Compensation Tribunal, 1981
14. Land Use in the ACT, 1981
15. *Australian Federal Police Act 1979*: Sections 38 & 39, 1982
16. Decisions under the *Broadcasting and Television Act 1942*, 1982
17. Review of Taxation Decisions by Boards of Review, 1983
18. *Compensation (Commonwealth Government Employees) Act 1971* - Amendments, 1983
19. Rights of Review under the *Migration Act 1958* and Related Legislation: Interim Report on the Constitution of the Administrative Appeals Tribunal, 1983
20. Review of Pension Decisions under Repatriation Legislation, 1983
21. The Structure and Form of Social Security Appeals, 1984
22. The Relationship Between the Ombudsman and the Administrative Appeals Tribunal, 1985
23. Review of Customs and Excise Decisions: Stage Two, 1985
24. Review of Customs and Excise Decisions: Stage 4: Censorship, 1985

### *Appendix M: Publications of the Administrative Review Council*

25. Review of Migration Decisions, 1985
26. Review of *Administrative Decisions (Judicial Review) Act 1977*: Stage 1, 1986
27. Access to Administrative Review: Stage One Notification of Decisions and Rights of Review, 1986
28. Review of Customs and Excise Decisions: Stage Three Anti-Dumping and Countervailing Duty Decisions, 1987
29. Constitution of the Administrative Appeals Tribunal, 1987
30. Access to Administrative Review: Provision of Legal and Financial Assistance in Administrative Law Matters, 1988
31. Review of Decisions under Industry Research and Development Legislation, 1988
32. Review of the *Administrative Decisions (Judicial Review) Act*: the Ambit of the Act, 1989
33. Review of the *Administrative Decisions (Judicial Review) Act*: Statements of Reasons for Decisions, 1991
34. Access to Administrative Review by Members of Australia's Ethnic Communities, 1991
35. Rule Making by Commonwealth Agencies, 1992
36. Environmental Decisions and the Administrative Appeals Tribunal, 1994
37. Administrative Review and Funding Decisions (A Case Study of Community Services Programs), 1994
38. Government Business Enterprises and Commonwealth Administrative Law, 1995
39. Better Decisions: review of Commonwealth Merits Review Tribunals, 1995
40. Open Government: a review of the federal *Freedom of Information Act 1982*, 1995
41. Appeals from the Administrative Appeals Tribunal to the Federal Court, 1997
42. The Contracting Out of Government Services, 1998
43. Administrative Review of Patents Decisions, 1998
44. Internal Review of Agency Decision Making, 2000
45. Report on the Council of Australasian Tribunals, 2002
46. Automated Assistance in Administrative Decision, 2004
47. The Scope of Judicial Review, 2006
48. The Coercive Information-Gathering Powers of Government Agencies, 2008
49. Administrative Accountability in Business Areas Subject to Complex And Specific Regulation, 2008





